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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS OF TEXAS

DURING THE

GALVESTON TERM, 1889, AND THE FIRST TWO MONTHS OF THE AUSTIN TERM, 1889.

REPORTED BY

JACKSON & JACKSON.

VOLUME XXVII.

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Rec. Sept. 2, 1889.

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COURT OF APPEALS OF THE STATE OF TEXAS.

PRESIDING JUDGE:

HON. JOHN P. WHITE.

JUDGES:

HON. JAMES M. HURT.

HON. SAMUEL A. WILLSON.

ATTORNEY GENERAL:

JAMES S. HOGG, ESQ.

ASSISTANT ATTORNEY GENERAL:

W. L. DAVIDSON, ESQ.

CLERKS:

P. WALTON, AT AUSTIN.

E. P. SMITH, AT TYLER.

H. A. MORSE, AT GALVESTON.

REPORTERS:

A. M. JACKSON.*

A. M. JACKSON, JR.

*Died July 11, 1889.

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NOTE.

In the report of the case of Hughes v. The State, beginning on page 127 of this volume, the name of F. M. Etheridge, Esq., of the Corsicana bar, should appear, associated with that of the Assistant Attorney General, as representing the State on Appeal.—REPORTERS.

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Alexander v. State	Travis	Assault to murder	3 years	Affirmed.
B				
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Beeman v. State	Llano	Felony theft	5 years	Dismissed.
Black v. State	Wilbarger	Aid'g prisoner to escape	2 years	Affirmed.
Brown v. State	Fort Bend	Carrying pistol	$25 & 20 days	Dismissed.
Brown v. State	Galveston	Assault to murder	2 years	Affirmed.
Brumly v. State	Brazoria	Robbery	5 years	Dismissed.
C				
Campbell v. State	McLennan	Robbery	25 years	Dismissed.
Campbell v. State	McLennan	Felony theft	2 years	Dismissed.
Campbell v. State	McLennan	Robbery	25 years	Dismissed.
Campbell v. State	McLennan	Felony theft	2 years	Dismissed.
Collins v. State	DeWitt	Carrying pistol	$25 & 20 days	Affirmed.
D				
Dean v. State	Bell	Murder second degree	16 years	Affirmed.
Diaz v. State	Cameron	Aggr. assault & battery	1 month in jail	Affirmed.
Dover v. State	Red River	Taking mortgaged property out of the State	2 years	Affirmed.
E				
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Ellis v. State	Harris	Cursing in public place	Fine $1	Dismissed
F				
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Finch v. State	Llano	Felony theft	2 years	Affirmed
Foster v. State	Maverick	Bringing stolen property into the State	5 years	Affirmed.
Fuller v. State	Van Zandt	Habeas corpus for bail	Refused	Affirmed.
G				
Garza v. State	Starr	Disturbing the peace	Fine $25	Dismissed.
Gibson v. State	Wilbarger	Felony theft	9 years	Dismissed.
Gomez v. State	Maverick	Felony theft	5 years	Affirmed.
Gonzales v. State	Webb	Assault to murder	2 years	Affirmed.
Gregg v. State	Gregg	Felony theft	7 years	Affirmed.

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Cases decided without written opinions.

Style of Case.	County.	Offense.	Penalty.	Disposition.
H				
Hall v. State	Tyler	Murder second degree	5 years	Dismissed.
Henderson v. State	Harris	Felony theft	2 years	Affirmed.
Holbrook v. State	Bee	Burglary	2 years	Affirmed.
Hugle v. State	Freestone	Playing craps	Fine $10	Affirmed.
Humphries v. State	Navarro	Cutting fence	3 years	Affirmed.
I				
Irwin v. State	Upshur	Murder second degree	80 years	Affirmed.
K				
Karr v. State	Milam	Felony theft	5 years	Dismissed.
King v. State	Red River	Assault to rape	5 years	Affirmed.
L				
Lane v. State	Mitchell	Embezzlement	2 years	Affirmed.
Lane v. State	Mitchell	Forgery	2 years	Affirmed.
Ledbetter v. State	Falls	Manslaughter	5 years	[death. Abated.
Lunsford v. State	Bell	Robbery	5 years	Affirmed.
Lyons v. State	Llano	Felony theft	5 years	Dismissed.
Lyons v. State	Llano	Felony theft	4 years	Dismissed.
M				
Mason v. State	Polk	Obstruct'g public road	Fine $10	Dismissed.
Mays v. State	Rusk	Felony theft	2 years	Affirmed.
Mertens v. State	Austin	Carrying pistol	Fine $50	Dismissed.
McGlew v. State	Upshur	Burglary	2 years	Affirmed.
Milby v. State	Jackson	Carrying pistol	$25 & 20 days	Dismissed.
Moore v. State	McCulloch	Felony theft	12 years	Affirmed.
Moore v. State	San Saba	Manslaughter	2 years	Affirmed.
N				
Nail v. State	Bosque	Murder second degree	12 years	Affirmed.
Norman v. State	Lavaca	Assault to murder	2 years	Affirmed.
P				
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Patterson v. State	Fayette	Murder first degree	Life	Affirmed.
Pool v. State	Erath	Felony theft	2 years	Affirmed.
Porter v. State	Guadalupe	Burglary	2 years	Affirmed.
Puppo v. State	Galveston	Illegally selling liquor	$75	Dismissed.
Pursley v. State	Jack	Felony theft	2 years	Affirmed.
Pursley v. State	Jack	Felony theft	2 years	Affirmed.
R				
Riley v. State	Red River	Arson	5 years	Affirmed.
Riley v. State	Tom Green	Felony theft	5 years	Affirmed.
Riley v. State	Tom Green	Felony theft	2 years	Affirmed.
Robbins v. State	Trinity	Murder second degree	15 years	Affirmed.
Roberts v. State	Washington	Carrying pistol	$25 & 60 days	Dismissed.
		Habeas corpus to reduce bail	Refused	Affirmed.
Robinson et al. v. State	Lamar			
Runnells v. State	Houston	Scire facias	$350 judgment	Dismissed.
Russell v. State	Travis	Assault to rape	5 years	Affirmed.

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Cases decided without written opinions.

Style of Case.	County.	Offense.	Penalty.	Disposition.
S				
Scarborough v. State	Trinity	Carrying pistol	$25 & 20 days	Dismissed.
Shwencke v. State	Fayette	Slander	$250	Affirmed.
Scott v. State	Grayson	Felony theft	6 years	Affirmed.
Sterling v. State	McLennan	Felony theft	3 years	Affirmed.
Sterling v State	McLennan	Burglary	3 years	Affirmed.
Stokes v. State	Brazos	Carrying pistol	$25 & 20 days	Dismissed
T				
Taylor v. State	Mitchell	Felony theft	5 years	Affirmed.
W				
Walker v. State	Lavaca	Arson	5 years	Affirmed.
Walker v. State	Upshur	Burglary	2 years	Affirmed.
White v. State	Polk	Felony theft	2 years	Affirmed.
Williams v. State	Red River	Burglary	2 years	Affirmed.
Williams v. State	Cooke	Manslaughter	2 years	Dismissed

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Civil Cases Disposed of at the Galveston Term, 1889.

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Reversed and dismissed	1
Reversed and rendered	4
Reformed and rendered	1
Dismissed	2
Total	70

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ADDITIONAL RULES OF PRACTICE.

It is ordered, That the following additional rules of practice for the District Courts be adopted, as additions to the existing rules, to be inserted at their appropriate places as indicated by their respective numbers, and that they take effect as to all bills of exceptions and statements of facts filed on and after the first day of October, 1889, namely:

72a. When it becomes necessary to insert in a statement of facts any instrument in writing, the same shall be copied into the statement of facts before it is signed by the judge, and itstruments therein only referred to and directed to be copied shall not be deemed a part of the record.

75a. Neither the notes of a stenographer taken upon the trial, nor a copy thereof made at length, shall be filed as a statement of facts, but the statement made therefrom shall be condensed throughout in accordance with the spirit of the foregoing rules upon the subject.

82a. All bills of exceptions and statements of facts shall be literally transcribed, and the clerks are hereby prohibited from copying as parts of the same any instrument in writing or document not originally inserted therein, but merely referred to and directed to be copied from some other paper in the case.

Adopted June 29, A. D. 1889.

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COURT OF APPEALS OF TEXAS.

GALVESTON TERM, 1889.

No. 6185.

JAMES STOUARD *v.* THE STATE.

1. PRACTICE—CONTINUANCE.—The statute under which one of plural defendants, whether jointly or separately indicted, by filing his affidavit to the effect that he verily believes there is no evidence against his co-defendant, and that the testimony of his co-defendant is material to his own defense, may require that his co-defendant be first tried, can not, independent of other sufficient showing, be held to operate a continuance of his case to secure the testimony of his co-defendant. When arraigned in the district court of Shackelford county, to which the venue had been changed from Stephens county, the defendant in this case filed an affidavit setting forth that Jane Stouard was charged by separate indictment with the same offense; that the indictment against Jane Stouard was still pending in the district court of Stephens county; that the testimony of the said Jane Stouard was material to his defense, and that he verily believed there was not sufficient evidence to convict the said Jane Stouard; upon which affidavit he prayed the court to order that the said Jane Stouard be first tried, and that his trial be continued in order to enable him to secure the testimony of said Jane Stouard, if acquitted. *Held*, that the court did not err in refusing to continue the case to await the trial of the co-defendant.
2. SAME—DILIGENCE.—The application for continuance recited also the absence of two material witnesses. Overruling the same for the want of diligence, the trial judge explained that, although confined in the same jail with one of the absent witnesses for months, the accused had taken no steps to secure the service of process upon him; and that, although, as shown by a previous application for continuance, the defendant knew that the other witness was an incurable invalid, and unlikely ever to be able to leave his bed, he had taken no steps to secure his deposition. *Held* that the ruling was correct.
3. MURDER—CORROBORATION OF ACCOMPLICE TESTIMONY—FACT CASE. See the statement of the case for evidence *held* insufficient to support a conviction for murder of the second degree because it rests upon the testimony of an insufficiently corroborated accomplice.

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Statement of the case.

APPEAL from the District Court of Shackelford, on change of venue from Stephens. Tried below before the Hon. T. H. Conner.

The conviction was in the second degree for the murder of W. D. Stouard, in Stephens county, Texas, on the eighth day of April, 1887. The penalty assessed against the appellant, who is shown to be the son of the deceased, was a term of sixty years in the penitentiary.

The trial in the court below was concluded on the ninth day of May, 1888, and the appeal was prosecuted to the Austin term, 1888, of this court. The case was submitted at that branch, but was taken under advisement and transferred to Tyler for decision. The opinion reversing the judgment of the court below and remanding the cause was rendered at Tyler, on the twenty-first day of November, 1888, but, the State filing a motion for rehearing, the same was taken under advisement and the papers in the case were transferred to Galveston, where, on the twenty-fourth day of January, 1888, the motion was denied without a written opinion. The case is now reported as of the Galveston term, but, as a matter of convenient reference, under the Austin number, at which branch the record is deposited.

R. L. Williams was the first witness for the State. He testified, in substance, that he was justice of the peace of precinct No. 3 of Stephens county, Texas, and held that position on the eighth day of April, 1887. He knew W. D. Stouard in his life time. The witness, on the said April 8, 1887, held the inquest upon the dead body of the said W. D. Stouard. It was between eight and nine o'clock p. m. when witness reached the body of the said W. D. Stouard. The said body was then lying in the lot near the house of deceased,—the said lot being about one hundred yards east of the said house. It lay on the left side with the back towards the gate, which was on the south side of the lot. The jury summoned by the witness removed the body to the house, where it was examined, the witness participating in said examination. Of the two wounds found on the body, both being gun shot wounds, one entered about two inches below the right shoulder blade, and passed out about the same distance below the right nipple. The other wound was in the head, the ball entering near the right eye and passing out at the back and near the crown of the head. The opening in

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Statement of the case.

the head caused by the ball was of a size between that of a fifty cent and a dollar silver piece. Its effect was to shatter the entire skull. There was powder burn on the eye brow and cheek bone. The horse lot in which the body of the deceased was found was about twelve by fourteen steps in size. Twelve or fifteen feet west of the gate in the south side of said lot, an empty cartridge shell was picked up by Mr. Childress. It was a forty-four calibre, center fire Winchester rifle cartridge shell, and it had the appearance of having been recently emptied by explosion. The ground in the lot was examined by the witness and his jury, but no indications of a struggle were found. The residence of the deceased stood about ninety or a hundred yards distant from the said horse lot gate. A stable stood in the southeast corner of the said lot, and, adjoining the said lot, in a southeast direction from the point where the body lay when witness first saw it, there was another stable. The distance between the body and the last mentioned stable was between one hundred and fifty and two hundred yards. The body was cold and stiff when the witness first saw it, and it was evident that deceased had been dead some hours. A Winchester rifle of forty-four calibre was found in the house of the deceased. The magazine of that gun contained a recently exploded cartridge shell of the same make and calibre as the shell found in the lot by Childress. The condition of that shell showed that it had been recently exploded, and the moist powder smut at the muzzle of the rifle showed that it had been recently discharged. The said Winchester rifle was of the calibre and manufacture in general use in Stephens county, and the two shells described were of the manufacture commonly used in that neighborhood. Baird lived on what was known as the Revis place, about half a mile southeast of Stouard's residence, and W. P. Love lived about half a mile southeast of the Revis place. The distances stated by witness were merely estimates.

J. D. Childress testified, for the State, that at the time mentioned by the witness Williams, he found an exploded cartridge shell in the horse lot of the deceased, at a point about three steps west from the gate. It was the shell of a forty-four calibre center fire Winchester rifle cartridge of the Union Manufacturing Company brand,—such as was in common use in the country. In the magazine of the forty-four calibre Winchester rifle which was found in the house of the deceased was found a shell of a recently exploded cartridge which corre-

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sponded in calibre and brand with the shell found by witness in the lot.

Elbert C. Crow was the next witness for the State. He testified that he was the nephew of the deceased, and at the time of the killing of deceased had been living at deceased's house about three months and a half. The Stouard family consisted of deceased and his wife Jane, their three adult and two infant daughters, and their sons William and James, the defendant. Witness and all the members of the family except William, who went to Albany on the seventh day of April, ate breakfast together at deceased's house on the morning of the fatal April 8, 1887. Nothing transpired at the breakfast table on that morning to indicate even unpleasant feeling upon the part of any member of the family towards another. Immediately after breakfast the witness left deceased's house and went to a point behind Love's field, about a mile southeast from deceased's house, to cut poles. He remained at that place until about eleven o'clock, when he returned to deceased's house for dinner, which was served at an unusally early hour. The deceased, defendant, Mrs. Jane Stouard, the two small children and the witness were the only parties at dinner, or at the house. Immediately after dinner the witness left the house to take the jack to water, leaving deceased, defendant, and Mrs. Jane Stouard in the kitchen. From the house the witness went to the outside stable which was between one hundred and fifty and two hundred yards southeast from the horse lot, got the jack and led him to the tank, which was about fifty yards north of the stable lot, and which lot he passed in leading the jack from the outside stable to the tank, and again in taking the animal back to the outside stable. When he had watered the jack and put him back in the said stable, the witness started back to the house. When he had reached a point about fifty yards distant from the horse lot, he heard the report of a gun. Looking in the direction whence the report came, he saw the defendant with a gun in his hands standing at a point a little west from the horse lot gate. Immediately afterwards the defendant opened the lot gate, passed into the lot, and thence to the point in the lot where the body of the deceased was subsequently found, pointed the muzzle of the gun straight down, and discharged it. He then sprang over the partition rock fence and ran toward the house. Immediately after the first shot was fired, the witness saw Mrs. Jane Stouard, about fifty

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Statement of the case.

yards distant from the lot fence, running up the hill towards the house. Witness then went to the lot gate and from that point saw the body of the deceased lying on the ground in the said lot. He then went to the house, where he found the defendant and his mother, Mrs. Jane Stouard. When he stepped on the gallery witness asked defendant: "What does that mean?" Defendant replied: "You stop!" He then seized the gun which was lying across the bed, and said to witness: "If you ever tell it I will kill you." Witness replied to that threat: "I will never tell it unless I have to." Mrs. Jane Stouard then said to witness: "If you will not tell it, I will give you two ponies, a saddle and bridle and the Revis place." She then directed the witness and the defendant to go at once to the vicinity of Jack Brown's place and hunt some jennets, as a means of keeping down suspicion against them, and not to return to the house until night. She directed witness also to tell Brown that the deceased had charged him, witness, to request him, Brown, to come to his, deceased's, house, on the morrow, and go with him to hunt horses on Hubbard creek.

Accordingly the witness and the defendant left Stouard's house at once and went to Brown's, where they arrived between one and two o'clock in the afternoon. Witness delivered the fabricated message to Brown, who asked him what the deceased was then doing. The witness, in reply, told him that deceased was at home working or peddling about the place. Witness then asked Mr. Brown if he had recently seen the Stouard jennets. Brown replied that he had, and directed witness and defendant where to find them. Witness and defendant then went to the place indicated, found the jennets, and drove them to an old ranch about two miles down the river which belonged to the deceased. They remained at that ranch until about an hour before sun down, when they went to the residence of deceased, arriving about dark. Approaching the house they saw a light, but no person in or about it. At a point near the house the defendant dismounted and directed witness to hold his horse until he could see who was in the house. He then went to the house and soon returned to witness and said: "There is not a d—d soul there." They then went to the horse lot and, after looking about, defendant said to witness: "There is nobody here; but, d—n him, he is lying out there yet." The witness and defendant then went off towards Baird's residence, en route to which they met Mrs. Baird, Mrs. Jones and Mrs.

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Ellen Childress, and Pink and Scrap Stouard, all daughters of deceased. These parties informed them of the death of the deceased, and directed them to take the news to Mr. Love. Witness and defendant then went to Love's house and found Love in his lot trying to catch his horse. Love, they ascertained, had already been informed of Stouard's death by Mrs. Jane Stouard. He directed that the witness should help him catch his horse, and that defendant should go at once for the justice of the peace. Defendant left to summon the justice, and witness remained and helped Love catch his horse.

Cross examined, the witness said that the inquest upon the body of the deceased was held at the house of the deceased on the night of the fatal day. The said inquest was held by Justice of the Peace Williams and several gentlemen who sat as a coroner's jury. The witness was sworn as a witness by the said justice, and testified before the said jury that he knew nothing whatever about the killing of the deceased, and that he did not know who did it. That testimony was false, and was known by witness to be false when he delivered it. His statement to Jack Brown that deceased had charged him to ask him, Brown, to come to his house on the next day and go with him to Hubbard creek horse hunting, was also false, and known by witness to be false when he made it. He likewise consciously falsified the facts when, at the same time, he told Brown that the deceased was then at home, working or peddling about the place. Will Stouard, who had gone to Albany, was not at the house of the deceased on the night preceding the killing, and no person spent that night at that house except the deceased, his wife, daughters, the defendant and witness. The grown daughters of the deceased left the house immediately after breakfast to go to the wash place. Soon after they left, the witness left the house and went to a point beyond Love's field to cut poles, leaving only the deceased, his wife, two small children and the defendant at the house. Will Stouard got home from Albany after dark on the evening of the fatal day. Sheriff Douglass came to the house on the morning after the murder and arrested Mrs. Jane Stouard, one of her grown daughters, the defendant and witness. After the arrest Mr. Jack Brown, the gentleman previously mentioned by the witness, took witness aside and advised him to tell all, if he knew anything, about the killing. Witness falsely told Brown that he knew nothing whatever about the matter. Witness and the

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Statement of the case.

other parties arrested with him were taken to Breckenridge that night by Sheriff Douglass, and were placed in jail.

At this point the witness was asked the following questions: "Did not Sheriff Douglass, after you were put in jail, ask you again if you knew anything about the killing, and try on several occasions to get you to tell him what you knew about it? Did not Deputy Sheriff Add. Sloan and County Attorney Greenwood also attempt, several times, to get you to tell what you knew about it?"

The witness replied: "I do not know whether they did or not. I will not deny that each of the persons named asked me the questions. After we were placed in jail,—I can't say how long,—Mrs. Stouard was taken out to see about employing counsel for her defense. I do not know the day on which she was taken out nor returned to the jail, nor whether it was day or night, but when she came back I asked her if she had employed counsel for me too, and she replied that she had not. Soon after this,—I don't know how long,—Douglass said to me: 'You d—d fool, don't you see they are going to saddle the whole thing on you? Why don't you tell all you know about it?' I then told him I was willing to make a statement about it. The reason I made the statement I did was that I was afraid they would saddle the whole matter on me. The statement was made in the presence of County Attorney Greenwood and Justice of the Peace Boyett. It was reduced to writing and was read over to me. I do not know whether I put my mark to the paper shown me or not. I put my mark to some paper. I do not know whether or not I was sworn, but I suppose I was. I held up my hand before the justice of the peace." In answer to a question the witness said that he presumed incarceration in the penitentiary would be the punishment inflicted for swearing falsely, but he knew of no other. Being shown a written statement,—the one marked exhibit "A,"—certified by Justice of the Peace Boyett, the witness said that, being unable to read, he was unable to identify it as the statement to which he made his mark. The witness could not remember whether or not, when he made his mark to the statement, he stated under oath that the said statement contained all that he knew about the killing of Stouard. The witness was unable now to state whether or not, when he made his statement before Justice Boyett, he said anything about going to Brown's and delivering the false message, as stated by him on this trial. He could

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not remember that he had ever before told about defendant, when at the lot on the night of the fatal day, saying: "There is nobody here; but, d—n him, he is lying out there yet."

Re-examined, the witness said that on the way home from the old ranch where they left the jennets, the defendant said to him: "Dead men tell no tales, do they?" To which he replied: "I never heard of it." Defendant then said: "If you ever tell this, I will do you the same way." The witness had his reason for not disclosing the truth at the coroner's inquest. He was a comparative stranger in the country; did not know the men assembled at the said inquest; was afraid, in the first place, that defendant would kill him if he told the truth, and did not know but that the men might side with the defendant against witness for denouncing him. The witness did not intend to tell the truth about the matter until the arrival of his father from a distant county, in whose ability to protect him the witness had confidence. He decided not to wait only when Sheriff Douglass told him that defendant and Mrs. Stouard were trying to saddle the killing on him. If witness did not speak, in his statement before Justice of the Peace Boyett, about telling Brown that deceased wanted him to go horse hunting, it was because he was not asked about it.

The statement of Elbert Crow before Esquire Boyett, marked exhibit A and certified by E. W. Boyett, justice of the peace, reads as follows: "Mr. Jim Stouard killed his father. His mother was in about fifty yards of him. They sent me to water the jack, and I was in about fifty yards of him when I saw him. He shot him once when I was in about fifty yards of him. I was in about twenty-five or thirty yards of him when he shot next one, and I went to the house and they asked me if I was going to tell it. Jim said if I did tell it he would kill me. Aunt Jane told me if I would not tell it she would give me two ponies, a saddle and the Revis place. She made us go to the river after some ponies, and told us to go to Mr. Brown's to keep down suspicion. She told us not to come back until night. As we came on back Jim told me that a dead man told no tales, and that if I ever breathed it he would kill me.

his
"ELBERT X CROW."
mark.

A. J. Brown testified, for the State, that the defendant and Elbert Crow came to his house on the fatal day between one and two o'clock. They came to the witness's house from a mes-

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quite valley, and said they were hunting the Stouard jennets. Witness told them where he had seen the animals on that morning. In the course of the conversation that ensued Crow said to witness: "Uncle (deceased) says for you to come to his place to-morrow and go with him down Hubbard, horse hunting." Witness asked him: "What was your uncle doing when you left him?" Crow replied: "Piddling about the place, not doing much of anything." Defendant and Crow soon left witness's place, going towards the place indicated by witness as the place where they would find the jennets. Fifteen or twenty minutes later witness saw them driving the jennets towards Stouard's old river ranch. He did not see them again on that day. Witness went to Stouard's house on the next morning and then learned of Stouard's death. Sheriff Douglass and other parties were present, engaged in an effort to trace the murderers. The witness took Crow aside and asked him if he knew anything whatever about the killing or who did it. Crow said that he knew nothing whatever about it. Douglass, after arresting Crow and defendant, placed them in witness's charge. Witness took defendant and Crow to the horse lot. They appeared to be very much "down" and weak in the knees. Crow appeared to be more excited than defendant.

W. P. Love testified, for the State, that Mrs. James Stouard came to his house about dusk on the fatal day and told him that her husband had been killed, and asked witness to go to the house to attend to matters for her. Soon afterwards, and while witness was trying to catch his horse, defendant and Crow arrived with the same report. Witness told defendant to go after the justice of the peace, and he left for that purpose. Crow helped witness to catch his horse. Witness then went to Stouard's house, where he found Mrs. Jones, Stouard's daughter. They went to the lot together, where witness held the lamp for Mrs. Jones to examine the body of her father.

J. W. Stouard, brother of the defendant and son of the deceased, testified, for the State, that he went to Albany on the day before the killing and got back about nine o'clock on the night of the fatal day. Deceased owned a forty-four calibre Winchester rifle.

Mrs. Jones, the daughter of the deceased and sister of the defendant, testified, for the State, that at the time of the homicide she lived at the house of Mr. Baird, on the Revis place. It was about dark when she first saw the body of her father.

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Witness and her four sisters, when they heard of the killing, started to the house from Baird's. En route they met defendant and Crow. Witness sent them to Love's with the news. When Love arrived he and witness went to the lot and examined the body.

The State having closed, the defense called Sheriff Douglass, of Stephens county, as its first witness. He testified that he reached Stouard's residence on the morning after the killing, and during the day arrested the defendant, his mother, one of his sisters and the State's witness, Crow, and took them to Breckenridge, where he put them in jail. From the time that he placed them in jail until the following Monday evening, the witness, with few and short absences, remained in the jail with the parties. During this time he did all that he could to induce Crow to tell what, if anything, he knew about the killing. In each conversation that he had with Crow he assured him that if he knew anything, and would tell it truthfully, he would be protected. Crow refused to tell anything until on Monday evening. Mrs. Jane Stouard was taken from jail on that evening to enable her to engage counsel for the defense of herself and her son. On her return Crow asked her if she had also engaged a lawyer to conduct his defense. Mrs. Stouard replied that she had not, as he could employ counsel himself. Witness then said to Crow: "You d—d fool, don't you see they are going to saddle it all on you? If you know anything you had better tell it." Crow then agreed to make a statement concerning the killing, which he subsequently did before Esquire Boyett and County Attorney Greenwood, which statement is contained in the document in evidence marked Exhibit "A." One John Essery was in jail at Breckenridge during the time that defendant was confined therein. Essery was charged with horse theft, and the deceased was one of the witnesses against him. One Wilcox was also in jail with defendant, but was released on bail a month or two before the change of venue in this case was ordered. Wilcox's people lived in Stonewall county. Witness did not know where Wilcox was at the time of the killing of Stouard.

Mrs. Ellen Childress, daughter of the deceased, testified, for the defense, that early on the fatal morning, she and her grown sisters went from home to the wash place, about a mile distant from the house of deceased, where they remained all day washing. About eleven o'clock the witness's mother, Mrs. Jane

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Stouard, and her small daughters came to the wash place where she remained, helping with the wash until nearly night. They got home between sun down and dark, and discovered the dead body of W. D. Stouard. Mrs. Stouard went at once to Mr. Love's, and witness and her sisters to Mr. Baird's to give the alarm. The witness did not go home from the wash place until the washing was finished just before night. Witness and her grown sisters, when they left home, left there the defendant, the deceased, Mrs. Jane Stouard, the two small children and the State's witness, Crow.

Veale & Son and *DeBerry & Wheeler*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for the homicide of W. D. Stouard, the appellant being convicted of murder in the second degree, with punishment fixed at sixty years in the penitentiary.

Mrs. Jane Stouard was separately indicted for the same offense, the indictments against each being presented in the district court of Stephens county, at the May term, 1887. When the case was called at the said term, the defendant James Stouard answered ready. Afterwards, on May 25, 1887, after having exhausted a venire of two hundred men, the district attorney moved for a change of venue to Shackelford county, because of the failure to procure a jury. Thereupon it was agreed by the defendant that the case might be sent to Shackelford county. At the same term the case of The State v. Jane Stouard was continued. Now on November 11, 1887, the case being in the district court of Shackelford county, the defendant filed his first application for continuance for certain witnesses, his mother, Jane Stouard, not being one of the number. The case was continued at the instance of the defendant. This case was called for trial on May 4, 1888, in the district court of Shackelford county, whereupon the defendant presented his second application for continuance for want of the testimony of Mrs. Jane Stouard, and because of the absence of other witnesses. The application was denied and defendant excepted, reserving his bill.

Mrs. Stouard's testimony being material and probably true, did the court err in refusing to continue the case until she could

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be tried, and, if acquited, be permitted to testify for the defendant? Whether indicted jointly or separately, if the offense grew out of the same transaction, either defendant, by making proper affidavit, is entitled to have the party for whose evidence said affidavit is made first tried. (Acts of 1887, p. 33.) By this article it is also provided that the making of such affidavit does not, without other sufficient cause, operate as a continuance to either party. This would seem to settle the controversy as to a continuance for the want of the testimony of Mrs. Jane Stouard. Independent of this provision, appellant is chargeable with the grossest negligence with regard to this matter, and upon this ground the court acted correctly in denying the application. Appended to the application to continue there is an explanation of the facts and circumstances relating to the other parties named in the application, which completely sustains the court in refusing to continue for the want of their testimony, and hence there was no error in refusing the application.

The witness Elbert C. Crow was evidently an accomplice, if not the sole perpetrator of the crime. The law applicable to the testimony of such a witness was correctly given in charge to the jury. Crow being an accomplice, the counsel for appellant earnestly contends that he is not corroborated in such manner as will justify a conviction. We have examined the statement of facts with great care, and are of the opinion that the evidence does not sufficiently corroborate the testimony of the accomplice witness.

Natural affection speaks strongly against such an act as the one charged—the son slaying his father. There were no former grudges, no antecedent menaces, no bad blood, no motive for the crime shown. The deceased's family consisted of his wife, James the accused, William, three daughters and two small children. William was at Albany when the killing occurred. The sisters were not at home, but were a mile away, washing. Crow states that at dinner there were at the house the deceased, his wife, defendant and two small children. One of the girls who was washing states that her mother came to the wash place with the two children about eleven o'clock. If this is true, the homicide may have occurred after the wife and two children had left the house for the washing place. Here we have a conflict between a daughter of the deceased and an avowed accomplice.

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Opinion of the court.

But again, Crow was also a member of the family. He had been living with the deceased about three months, and had access to the gun as well as did James Stouard—the gun was the property of the deceased. Crow and defendant lived with deceased. Now let us concede that deceased was shot with his own gun. Why not infer that Crow shot him? Let it be conceded that there was no motive inducing Crow to commit the deed, neither is there any shown prompting the son or wife. Their opportunity was the same, the gun being as convenient to the one as to the other. Then why infer the son's guilt and not Crow's? Nature revolts against the crime if committed by Crow, but tenfold stronger if committed by the son. Then why infer the unnatural act from facts tending equally to prove the guilt of another? The accomplice Crow repeatedly denied all knowledge of the crime. The record shows that he lied most infamously. Nor did he charge the appellant with this most unnatural deed until he was induced to believe that he would be himself accused by the appellant or his mother. In view of these facts, and in view of the fact that the accused was the son of the deceased, we again urge the question, why infer appellant's guilt and not Crow's? Where the physical facts attending the homicide show that but one party did the killing, evidence which tends with equal force to criminate several, without pointing out which, has but little force. Hence, if Crow is corroborated at all, it is so slight as to render it dangerous to sustain the conviction.

Because the testimony of the accomplice is not sufficiently corroborated, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 21, 1888.

Motion for rehearing overruled without written opinion, January 24, 1889.

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No. 2533.

HIPOLITO SANCHEZ *v.* THE STATE.

1. OFFERING FOR SALE ADULTERATED FOOD—INFORMATION.—See the statement of the case for an information *held* sufficient to charge the offense of offering adulterated food for sale.
2. SAME—EVIDENCE—FACT CASE.—To support a conviction for offering adulterated food for sale it devolves upon the State to prove not only that the accused offered such food for sale, but that, when he did so, he knew that the said food was adulterated. See the statement of the case for evidence *held* insufficient to support a conviction for offering adulterated food for sale.

APPEAL from the County Court of Webb. Tried below before the Hon. J. M. Rodriguez, County Judge.

A fine of five dollars was assessed against the appellant upon his conviction for offering adulterated food for sale, under an information which charged him as follows: "In the name and by the authority of the State of Texas: E. R. Tarver, county attorney of Webb county, State aforesaid, in behalf of the State of Texas, presents in the county court, at the August term, A. D. 1888, of said county, that Ypolito Sanchez, on or about the eighteenth day of August, A. D. 1888, in the county of Webb and State aforesaid, did then and there unlawfully and knowingly offer for sale an adulterated article of food, to wit, milk, against the peace and dignity of the State."

The case was tried by the judge without the intervention of a jury, and the facts proved are certified by the judge as follows: "The following were the facts and all the facts proved, to wit: The defendant is in the thirteenth year of his age. At the time of his arrest, and for two years previous, he was a vendor of milk in Laredo, Texas. He was arrested on the morning of the day named in the information, at the usual time of selling milk, with a can of milk. The milk, when tested by the lactometer used by the city physician, marked sixty degrees. The defendant, in the two years he had been selling milk for his mother, had performed his duties well, always making proper account for the milk he sold."

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Opinion of the court.

The lactometer used was the same kind as the one approved and adopted by the New York Board of Health. The "lactometer" is a glass tube, graduated with numbers running from one hundred and twenty degrees downward. When placed in the finest quality of milk, this tube floats so as to bring the number "120" to the surface of the milk. When placed in the poorest quality of milk, it will so float as to bring the number "100" to the surface. With Texas range cattle in poor condition, the lactometer will go something below one hundred degrees. The milk of goats running on the range near Laredo has marked, in one instance, as low as eighty degrees. The city physician of Laredo, Doctor Arthur, condemned milk in which the lactometer floated so as to bring the number of degrees on the instrument below seventy-five degrees—allowing twenty-five degrees for the difference in the manner of care between Texas and northern stock. The effect of pouring water into milk in which a lactometer is floating is to cause the instrument to sink deeper in the fluid. If placed in pure water, the lactometer will sink until the figure indicating one degree is on the surface. The defendant was found with the milk in question on the streets of Laredo, Webb county, Texas.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for the offense denounced by the act of April 10, 1883 (Willson's Cr. Stats., sec. 656), the information charging that the defendant "did, unlawfully and knowingly, offer for sale an adulterated article of food, to wit, milk." A jury was waived and the cause was determined by the judge.

While the information does not follow the statute literally, and directly charge that the milk was known by the defendant to be adulterated, we think it substantially sufficient, and that the court did not err in overruling the exceptions made thereto.

To warrant a conviction of the defendant, however, it was essential for the prosecution to prove not only that the milk was adulterated, but that the defendant knew that fact. In the record before us we find no proof of such knowledge on the part of the defendant. Nor is there any evidence in the state-

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ment of facts before us that the defendant offered to sell the milk.

As presented to us the evidence is manifestly insufficient to warrant the conviction, and the judgment is therefore reversed and the cause is remanded for another trial.

Reversed and remanded.

Opinion delivered January 12, 1889.

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No. 2769.

B. F. BLOCKER *v.* THE STATE.

ON REHEARING.

1. PRACTICE—MURDER—CHARGE OF THE COURT.—It is an established rule of practice in this State that, upon the trial of an offense which comprehends different degrees it becomes the imperative duty of the trial court to instruct the jury upon the law applicable to every degree or grade of offense indicated by the evidence, however feeble such evidence may be; that, if there be a doubt as to which of two or more grades of the offense the accused may be guilty, the law as to all of such grades should be charged, and that the trial court should omit to charge the law of any particular grade only when it is to no extent whatever raised by the evidence. See the statement of the case for evidence adduced on the trial for murder, which, though sufficient to establish the express malice essential to constitute murder of the first degree, is not of such character as to absolutely preclude the jury from finding therefrom a killing upon implied malice, and, therefore, murder in the second degree; wherefore the omission of the trial court to instruct the jury upon the law of murder of the second degree was error.
2. SAME.—The accused, being on trial for murder, contends that, under the law of this State, it is the duty of the trial judge, in murder cases, without regard to the evidence adduced, to instruct the jury as to the law of murder of the second degree. But *held* that, notwithstanding the apparent plausible construction of the statutes upon which the proposition is maintained, the doctrine obtains in this State that the trial court may decline to submit to the jury the issue of murder of the second degree when the evidence wholly fails to present that issue. See the opinion in extenso upon the question, and note the suggestion relative to the charge in trials for murder.

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Statement of the case.

APPEAL from the District Court of Bowie. Tried below before the Hon. W. P. McLean.

The conviction in this case was in the first degree for the murder of G. W. Wood, in Bowie county, Texas, on the eighth day of March, 1887. The penalty assessed by the verdict was a life term in the penitentiary.

John W. Clowers was the first witness for the State. He testified that he knew the defendant, whom he identified in court, and that he knew Wood in his lifetime. Wood met his death in Bowie county, Texas, in 1887, at about two hours after sun rise on a day the witness did not remember. He was killed by a gun shot at or near a shanty which had been constructed in a lumber camp, and which shanty he was supposed to be pulling down at the time he was killed. At that time the witness was about three-quarters of a mile distant from the said shanty, "getting out" ties for the defendant. The said shanty was in an east direction from where the witness was at work. There was a road about fifty yards distant from where the witness was at work. The defendant, riding a chestnut sorrel horse, and B. F. Pittman, riding a bay horse, and each armed with a Winchester rifle, came to where the witness was at work on that morning. When they left, they went through the woods in a northwest direction. They may or may not have gotten into the road before reaching the shanty—if they went to it. About fifteen minutes after they left the witness heard the report of a gun fired from the direction and about the locality of the shanty. Soon after the gun shot mentioned, the witness called the attention of Messrs. L. C. Pope, Peacock, William Knighton and Neeley Poplin to tracks at the place where he, witness, was at work, which tracks were made by the horses of the defendant and Pittman a quarter of an hour before the shot was fired. The tracks of those horses were trailed by the witness and other parties from the place where the witness was at work to the place where the killing occurred. When the witness went to the place of the killing, after hearing the shot as stated, he found the dead body of Wood, lying at the corner of the shanty.

Cross examined, the witness said that the carrying of guns in the neighborhood was not unusual. The house in which the witness lived was about two hundred and fifty yards a little

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north of east from the place where he was at work when he heard the gun shot, and it was between a half and three-quarters of a mile distant from the place where Wood was killed. Witness was west from his house and west from the shanty where Wood was killed. To go direct from where the witness saw them, to Wood's shanty, the defendant and Pittman would necessarily pass the witness's house. For a week prior to the killing Wood had been idle. Prior to that time he worked a week or two for the defendant. Witness did not know who Wood was working for when killed. The witness saw no horse tracks at the place where he was at work when defendant and Pittman joined him, either before or after that time, except those made by the horses ridden by the defendant and Pittman.

L. C. Pope was the next witness for the State. He testified, in substance, that Wood met his death on the morning of Tuesday, March 8, 1887, in Bowie county, Texas. The witness saw his dead body on that morning, about an hour and a quarter after the shooting. It lay against the northwest corner of a pole shanty that had been built for the occupation of tie cutters, partly on the side and back, with the left leg considerably and the right leg partially drawn up. The arms were also drawn. Witness found three wounds on the body, one entering the back to the left of the spinal column, one in the leg, about three inches above the knee, and the third cutting across the right thumb. The said wounds appeared to have been made by medium sized balls. The empty shell of a rifle cartridge, No. 38 in size, was found on the ground near the body. The defendant owned a gun at the time of the killing, but witness did not know what kind of a gun it was. The witness, who, with Mr. Knighton, Mr. Poplin and Mr. Pretty, examined the ground, found, near the body, the tracks of two horses, one shod and one unshod. The said tracks approached within twenty steps of the point where the body lay, whence they went west a short distance, and thence south. The tracks were very plain at the point, about a hundred steps distant from the body, where they crossed a branch. The witness and his companions back trailed the said tracks from the point near the body, to the point in the woods where Mr. Clowers was said to have been at work when the fatal shot or shots were fired. The tracks near the body, and along the trails, and at the point where Clowers was at work, corresponded in size, by measurement, and in appearance. At each of the said places they

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Statement of the case.

showed to have been made by a shod and an unshod horse. The condition of the pole shanty when the witness reached it, an hour and a quarter after the killing, indicated that, when killed, Wood was removing, or preparing to remove the timbers of the shanty. One side of the shanty had been completely razed, and between fifteen and twenty boards had been torn from the other side. The boards taken from the shanty were lying by the side of the same, and a wagon to which an ox team was hitched, and which was understood to belong to Wood, was standing near. There was nothing in the hands of deceased when witness reached the body.

Cross examined, the witness said that he was present at the inquest upon Wood's body, and saw a member of the jury take a forty-four calibre repeating pistol from the hip pocket of the deceased. The witness did not see either a broad ax or pole ax near the body, but saw a double bladed ax near it. Eight or ten people, all of them having come on foot, were at the body when the witness reached it. He saw no horses there at that time. The witness was at the body a minute before he saw any of the horse tracks near the body, and fully thirty minutes elapsed before he went to the point in the woods where Clowers claimed to have been at work at the time of the shooting. The witness had been at the body about fifteen minutes before he observed Mr. Clowers. The tracks back trailed by witness from the point near the body to where Clowers claimed to have been at work, traversed what the witness considered to be a very dim road. The witness could not say that he saw and examined each consecutive track over that trail, between the two points mentioned, but he followed the trail, just as he would follow the trail of a horse he had lost, and that trail led him from the point near the dead body to the point where Clowers had been at work. The witness had never testified on a former trial of this case that he saw four wounds in the body of deceased; or if he did, he did so by inadvertence. The witness did not hear the fatal shots, but was told by Mr. Knighton that he, Knighton, heard shooting on that morning. Soon afterwards Mr. Pretty told witness of the killing of Wood. Some of the chambers of the pistol found on the body of the deceased were loaded, and some were empty. Witness did not remember how many were loaded nor how many were empty. Mr. Pretty's house, which was the nearest one, was between three and four hundred yards from the place of the homicide. The witness

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measured the several horse tracks mentioned by him with a stick, and found them to correspond in size, as they did in appearance.

T. H. Lenox was the next witness for the State. He testified, on direct examination, as follows: "I knew the defendant, and I knew G. W. Wood in his life time. I saw Wood after his death at a tie camp about nine miles from DeKalb, in Bowie county. He was in a wagon when I first saw him; he was lying in the wagon preparatory to be taken to Mr. Pope's to be buried. They showed me two wounds on him; one was in his thigh. I did not notice particularly, and do not know in which leg. The other was in this (places his hand on his back) portion of his back. The wounds I saw went in from behind, and were made with bullets. I noticed his shirt too where it was shot. The shots were not fired from the largest size Winchester rifle or pistol. I arrested Mr. Blocker and Mr. Pittman. Mr. Blocker was at home—that is he was in his field. It was just after dark when we reached his house, and we hallooed for him two or three times. Mr. Pittman was at Mr. Blocker's; we had him there, and he hallooed for Mr. Blocker. Mr. Blocker was down west of the house; he came from towards the barn; was walking and leading a small sorrel bob tailed horse; he had a Winchester rifle, I think it was a thirty-eight. I had it in my hand. We carried Mr. Blocker into DeKalb and put him under guard that night at the Bullard hotel. When we arrested him he had a small sorrel, blazed face, bob tailed horse. That night in traveling the horse seemed to be crippled very badly. I asked the cause and he said that 'he interfered.' The next morning a party of us examined the horse's feet, and his front feet were trimmed closer than I ever saw a horse's feet worn or trimmed. I do not think there were any nail holes in his feet. I noticed that they were trimmed or filed off very close. I made a rapid examination of the ground about the place of the homicide. I was shown the point, about twelve steps distant from the shanty, where two horses had stood, from which point I followed them to where they crossed a branch sixty or seventy yards distant. One of those horses was shod in front; the other was barefooted. The bank of the branch where they mounted it was very nearly perpendicular and was about three feet high. From the shanty, as far as I trailed them—to the crossing of the branch—the tracks showed that the horses traveled on a full run. I saw no weapons on

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or about the person of the deceased. I observed the condition of the shanty while there. The boards on the east side of the roof had been recently torn off. They were torn off, I thought, from their appearance, on that day. Certainly not more than two days had elapsed since they were torn off."

On his cross examination, the witness said that his feelings for the defendant were neither kind nor unkind. He did not feel unkindly to him, but did not love him, and entertained a much more favorable opinion of many other men than he did of the defendant. Witness and defendant, about four years before this trial, had a disagreement about a filly. They had no law suit about it. Witness and defendant each claimed to own the said filly, and the witness got it. It was about an hour and a half after dark on the fatal day when the witness, with Officer Rose, Mr. Chapman and another person, reached the defendant's house and arrested him. They arrested Pittman at defendant's house before they made the arrest of defendant. The witness and his party reached DeKalb with their prisoner between eleven and twelve o'clock on that night. Witness did not know what was done with defendant's horse between the hour of their arrival in DeKalb and nine o'clock on the next morning, when witness next saw that animal. The witness had no recollection of seeing defendant on the eighth day of March, until he arrested him. He was told that the defendant was in DeKalb on that day.

Re-examined, the witness described the Winchester rifle which the defendant had, when arrested, as a gun which chambered fourteen cartridges. A single movement of a lever would throw off an exploded shell and place a cartridge in position for shooting. Some time after the disagreement between witness and defendant about the filly referred to in the direct examination, the defendant reported to witness that he had become satisfied that the animal in dispute belonged to witness, and that he had found his animal.

W. B. Knighton, the next witness for the State, testified as follows: "I knew G. W. Wood in his lifetime. When I first saw him dead he was up by the corner of a little shanty in an old tie camp, about nine miles from DeKalb, Bowie county. He had been shot three times—once in the back, once in the leg and once in the hand. I guess he had been dead when I got to him about an hour and a half; it was about that long since I heard the guns. I heard three shots. I made an investigation

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as to tracks around the place, after I got there, and found the tracks of two horses coming from the way Mr. Wood lived—one was shod in front and one was barefoot. Wood lived three-fourths, probably a mile, from the tie camp. The tracks stopped about nineteen or twenty steps from the dead body; from where they stopped they ran south across a branch. We tracked them into the woods a short distance the way they went. When we came back Mr. Clowers was there, and we took the back track and tracked them to where Mr. Clowers said he had been at work making ties, and where we found some ties and tools. We measured the tracks where the dead man was, and where Mr. Clowers said he had been at work. We measured them at both places, and they measured to be the same tracks. At the camp where the man was killed, and where Mr. Clowers said he was at work, the tracks measured the same, and at both places they looked alike. One of the horses was shod in front and the other was barefooted. In back tracking them to where Mr. Clowers said he was at work, we took a trail that led out and from the road and went by Mr. Pretty's. The tracks seemed to be the same all along. I saw a double billed ax about eight feet from the shanty, but remember nothing else. The bullets entered Wood's body from behind."

Cross examined, the witness said that he lived about one mile distant and a little east of south from Clowers's house, and about four hundred yards a little west of north from Pope's house. The place of the homicide was about a mile southeast from witness's house. The witness reached the place of the homicide about nine o'clock, as near as he could estimate the time. He went to that place with Mr. Pope and his step son, and Mr. Pretty and his son, and found there Sam Phillips, Mr. Poplin and another person whom he did not now remember. The person last referred to may or may not have been Mr. Clowers. He saw Clowers perhaps thirty minutes later—when he got back from trailing the horses. Witness, Pope and Phillips carried guns in trailing the horses. Witness's gun was a seven shooting Spencer rifle; Pope's was an ordinary shot gun, and Phillips's an old fashioned gun of unknown description. Witness saw several Winchester rifles in the possession of parties who had reached the ground by noon. Witness saw several horses on the ground during the day. It was about eight o'clock when he heard the report of the guns. Mr. Clowers conducted the witness and party to the place where he said he

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was at work when he was arrested by defendant and Pittman, and he pointed out certain horse tracks at that point. The place where he said he was at work at that time was between twenty-five and thirty steps from the dim road. The first two shots heard by witness on the fatal morning were fired very nearly together; the third after a short intermission.

J. W. Peacock was the next witness for the State. He testified that he had seen Wood a few times in his life time. He last saw him alive a few minutes before his death, on the morning of March 8, 1887. Passing Wood's shanty, at a distance of about two hundred yards, with a load of ties, the witness saw Wood on top of the shanty, removing boards, etc. While driving along the road a very short time later, the witness heard three reports of a gun, the first two fired very near together, and the third after a slight intermission. Witness, who was then not more than two hundred yards distant, hallooed, and presently saw two men running their horses from the direction of the shanty at or near which the guns were fired. As nearly as witness could tell the color of the horses ridden by the men, one was a bay and the other was a sorrel. When witness first saw them, they were between the shanty and the branch, running from the shanty towards the branch. The witness supposed that the two men had fired at a deer or a turkey. He saw no other person at or near the shanty. It was an hour and a half, or perhaps two hours later, before the witness went to the shanty and there saw the dead body of Wood, which, however, he did not examine until the coroner's jury arrived. The witness examined the ground over which he saw the two men fleeing just after the shooting, and saw the track of a horse shod in front and the track of an unshod horse. John Clowers was at the shanty with the body when witness arrived. Witness and others then went to a point in the woods near Clowers's house, where Clowers showed them certain horse tracks. Those tracks were back trailed, step by step, from a point about twenty steps from the body to the point where Clowers exhibited the tracks,—that being the point where Clowers claimed to have been at work at the time the shots were fired. The tracks at that point, and over the trail, and at or near the shanty, and which led away from the shanty, to and across the branch, over the route pursued by the men seen by the witness just after the shooting, corresponded perfectly in size and appearance. Witness could tell by the falling of boards and

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poles that Wood was tearing off boards and throwing them down when he was shot. The reports of the gun and the noise of the boards intermingled.

Cross examined, the witness said that he lived on the Mill Creek road, a mile or two miles distant from the place of the homicide. He was hauling his first load of ties at the time he heard the shots and saw the two men fleeing from the vicinity of the shanty. There were several tie camps or shanties in the neighborhood of the Wood shanty. There was one about four or five hundred yards up the branch, and another four or five hundred yards west from the place of the homicide. The place where Clowers said he was at work when the shots were fired was five, six or seven hundred yards distant from the place of the homicide—witness could not state the exact distance. Clowers's house was about six hundred yards distant from the Wood shanty, as witness would estimate the distance—somewhat nearer to the said place than was the place where Clowers said he was at work on that morning. Witness did not recognize either of the men he saw on the horses, fleeing from the place of the homicide. He knew defendant quite well, and had often seen Pittman, but did not recognize either of them as the men whom he saw on that morning. The growth between the point where the witness was and the ground over which the two men fled was sparse. Witness did not observe those parties for the purpose of identifying them. He merely thought they had shot and were pursuing game of some kind. They rode hurriedly, and, where the ground admitted of it, at top speed.

L. C. Pope, recalled by the State, testified that for some time prior to the killing he had charge and control of the Bob Lassiter land, as Lassiter's agent. Some time prior to the killing of Wood, witness contracted to sell him, Wood, the timber on two hundred acres of the Lassiter land. Defendant had no interest in any ties on the Bob Lassiter land, so far as witness knew. He never claimed any interest whatever in or to anything on the Lassiter land—at least, he never made such a claim to witness. For a while previous to the homicide, the deceased worked for the defendant, getting out ties.

Bob Lassiter testified, for the State, that he knew both the defendant and the State's witness, L. C. Pope. Mr. Pope represented the witness as agent for land he owned in Bowie county, in 1887. The witness, in 1887, sold the cross tie timber

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on the Bukahn survey in Bowie county to defendant and Pittman, as partners. This transaction was had with Pittman, who represented himself as agent and partner of defendant. The bill of sale was made to Blocker & Pittman. The witness afterwards wrote to Pittman that his agent, Pope, had sold the timber on some of the land to Wood.

J. B. Chapman testified, for the State, that he was a blacksmith by trade, and that he lived in DeKalb, Bowie county, Texas. Witness shod the front feet of a small white-legged sorrel horse for defendant, a few days—not more than a week, and perhaps not so long—before the killing of Wood. He next saw the horse on the night of the fatal day. Witness, Captain Lenox, Rose, Dock Mills and somebody else went to defendant's house and arrested him that night, and took him to DeKalb. The party reached defendant's house after dark. Defendant came to them from the direction of his lot, bringing with him the same sorrel horse which witness had shod a few days before. The witness saw that horse about twelve o'clock on that night, and again on the next morning. He examined the horse on the next morning, and found that the shoes he had put on the front feet had been recently pulled off, and that the hoof had been trimmed to the quick—almost spoiling the feet. The nail holes had been trimmed out. Defendant was in DeKalb between eleven and twelve o'clock on the fatal day. He tied his horse to a tree, and put his gun in witness's shop. When the witness got back from dinner the gun was gone. The horse's feet at that time were not in the condition in which the witness found them next morning. Pittman rode a bay horse into town after his arrest on the night of the fatal day.

Cross examined, the witness stated that he did not recollect whether or not he examined the feet of the defendant's horse on the night of the fatal day or until the next morning. If he did, it was after reaching DeKalb, and he did no more than lift up one of the feet. He carefully examined the feet on the next morning, and called the attention of at least a dozen people to their then condition. The defendant's horse was hitched behind a saloon in DeKalb when witness saw it on the night of the fatal day, and was at the same place when witness saw it next morning. Defendant was then under guard in the Bullard Hotel. Witness and the defendant's brother once had an insignificant quarrel.

W. B. Presley testified, for the State, that he went to DeKalb

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on the day of the homicide. He was overtaken on the road near DeKalb by the defendant, who was riding a small streak-faced sorrel stallion. They rode into DeKalb together about eleven o'clock and hitched their horses near Chapman's blacksmith shop. Defendant's horse had shoes on the front feet. He appeared to have been but recently shod. The defendant when he overtook witness had a Winchester gun on his saddle, and his horse was sweating from the girth forward.

Miss Alice Pretty testified, for the State, that she lived at her father's house, about three hundred yards distant from the shanty at which Wood was killed. She did not know either the defendant or Pittman. Early on the morning of March 8, 1887, Wood, riding in and driving an ox wagon, passed the witness's house, going towards the shanty. She afterwards heard a noise which proceeded from the neighborhood of the said shanty, and which sounded like some person was violently tearing boards from the same and throwing them to the ground. Some time later, witness could not say how long, but when the sun was about two hours high, two men riding horseback — one on a small sorrel and the other on a bay horse — passed the witness's house, going in the direction of the shanty. They were both armed with guns. Witness did not then know either of the men, but she thought that she afterwards, in the court house in Texarkana, saw the man who was on the bay horse, and, if so, that man was Pittman. Within two minutes after those men passed beyond the sight of the witness, she heard three reports of a gun or guns. The first two shots were fired very nearly at the same time, and the third after a short intermission. The noise which sounded to witness like falling boards blended with that of the shooting. Witness soon afterwards went to the shanty and saw Wood's dead body.

Cross examined, the witness said she did not know that she saw the defendant on the fatal morning, unless he was one of the men who passed her house on horseback, just before the guns were discharged. Those two men were then strangers to her. She was not positive, but was confident, that the man she pointed out at the habeas corpus trial, and who she thought was Pittman, was one of the men who rode past her house on that morning. Cass Pope did not, at the request of witness, point Pittman out to her at the habeas corpus trial.

George Reed testified, for the State, that, after breakfast on

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the morning of March 9, 1887, he saw the horse that was said to have been ridden into DeKalb on the night before by the defendant, and, at the instance of defendant, who was then in jail, took that and another horse to a stable and fed them. The front feet of the defendant's horse were in a wretched condition, the result of recent trimming. The hoofs were trimmed close enough to obliterate all of the nail holes, except perhaps one or two.

N. M. Carpenter testified, for the State, that he lived in a house on defendant's place at the time of the homicide, and was then in the employ of the defendant. About sun rise, or a very little time after, on the fatal morning, the witness went to defendant's barn. As he stepped into the barn he observed Pittman squatted near one of the horse stalls. Within a very short time the defendant came into the barn with his Winchester gun in his hand, which he put down, resting it against the stall which contained his star faced sorrel horse. The witness then left the barn and saw Mr. Pittman's bay horse, under saddle, standing by a wagon in the field. The witness now lived on the place of Mr. Lenox, at the mouth of Mill creek.

The State closed.

Eddie Van Bibber was the first witness for the defense. He testified that he was twelve years old. He remembered the killing of Wood. When the fatal shots were fired the witness was standing on the big road, about one hundred and twenty or one hundred and fifty yards distant from Wood's shanty, talking to Mr. Peacock, and to Charley Phillips, a boy about twelve years old. Immediately after the shots were fired the witness ran to the shanty, and saw Wood lying on the ground, groaning. Two men, one armed with a shot gun and the other unarmed, so far as the witness saw, were walking rapidly away from the direction of the wounded man, towards Blocker's house. One of those men the witness took to be Mr. Baker, the partner of Wood, and the other he took to be Mack Lynch. Witness saw no horses about the shanty. As soon as he realized what had happened, the witness ran off to the house of his cousin, John Clowers, and reported the shooting of Wood.

On cross examination the witness said that Mr. Peacock was on the ground in the road, and not in his wagon at the time of the shooting. Charley Phillips was in the wagon, holding the lines. Peacock hallooed when the guns fired. The witness, who was on his way to his cousin, John Clowers's, house,

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thought that some person was shooting at a deer, and he ran in the direction of the shots, which was towards the shanty. The witness was not absolutely positive that the men he saw going from the shanty were Baker and Lynch. He, however, was very confident of that fact, especially as to Baker, as the clothes worn by that man were similar in every respect to those habitually worn by Baker. The man who had the shot gun was the man the witness took to be Lynch. The said two parties were not more than ten steps distant from the shanty when witness saw them.

S. A. Barton testified, for the defense, that he last saw one George Baker on the Sunday preceding the Tuesday of Wood's death. Witness and Buck Blocker, a brother of the defendant, met Baker on the road in the vicinity of the defendant's plantation, on the morning of the said Sunday. On that occasion Baker attempted to buy a gun from Buck Blocker, which Buck declined to sell. Buck soon left the witness and Baker together, when Baker remarked to witness that Wood had threatened him several times; that he, Baker, had no ties to keep him in Bowie county, and that he would be even with Wood when he, Baker, and witness should next meet; that Wood recently found him asleep in the shanty, and told him that the next time he, Wood, caught him, Baker, asleep, he would kill him; and he, Baker, told witness that Wood had crowed over him long enough, and he thought it best to get even with him. Witness had never seen Baker since. Baker and Wood were partners in getting out and selling tie timber. On his cross examination the witness declared that he did not know as a fact that Baker left the vicinity and went to Texarkana, before the killing occurred. He had been told, however, that Baker went to Texarkana on Monday, the day before the killing.

M. R. Barton testified, for the defense, that he met George Baker in DeKalb on Monday, the day before Wood was killed. When witness got ready to leave that town to go home he remarked to Baker: "I believe I will strike for the western breezes"—meaning that he would go home. Baker replied that he was going to strike for the northern breezes. The witness then asked him if he was going to leave, and he replied that he was, and in an angry manner said that he and his partner Wood had had a row on that morning. Witness understood Baker to mean that he was going north,—a direction that would

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not take him towards the place of the homicide. Witness had not seen Baker since. On his cross examination the witness stated that he did not know that Baker left the country prior to the killing of Wood. As stated, he last saw Baker in De Kalb on the day before the killing. Witness felt no especial interest in the result of this trial.

R. J. Ellis testified, for the defense, that he lived on the place of M. P. Blocker at the time Wood was killed. He last saw Wood alive on the day before he was killed. Wood was then at the defendant's place. He got some lumber from the defendant, which the witness helped him to load on his wagon. During the time Wood was at defendant's place on that day he and defendant spent some time in conversation. Witness did not hear what they said to each other, but they talked in a perfectly natural and friendly manner. Baker and Wood were both at the defendant's house on the previous Friday evening. They all appeared to be on friendly terms, and defendant pressed Wood and Baker to remain at the house for supper.

W. W. Pope testified, for the defense, that about ten days or two weeks after the killing of Wood he saw the Blocker sorrel stallion in DeKalb, and, having heard reports concerning the condition of its front feet, he took occasion to examine them. The condition of the front feet indicated to witness that shoes had been taken therefrom about ten days before. Witness found nail holes—he could not say how many—in each of the front hoofs. Nothing about the said hoofs indicated to witness's mind that they had been recently trimmed to the quick, and witness did not think that if the said hoofs, ten days before that time, were in the condition they were generally reported to be in, they would be in the condition in which he found them. Witness could discover nothing more than that a pair of shoes were torn from the feet about ten days before.

S. P. Phillips testified, for the defense, that about seven days after the killing of Wood, he traded for the defendant's certain dark sorrel pony stallion. If anything was the matter with the front hoofs of that horse when witness got him, witness did not then, nor has he since detected it. The front feet were unshod, but there were nail holes in each of the front hoofs, at least one inch from the edges of the same. Witness had to trim those hoofs twice before he got the nail holes out.

Reed Phillips testified, for the defense, that he saw the defendant's sorrel stallion pony, on the day of the homicide, but

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did not then observe his front feet. He next saw that animal on the second day after the killing, when, having heard talk about the condition of the front feet, he examined them. He found that a pair of shoes had been recently removed from the front feet, but the hoofs were in good condition—not hurt at all. Witness observed between eight and twelve nail holes in the two hoofs.

J. H. Roden testified, for the defense, that he was at the house of the defendant on the morning of the homicide. Between seven and eight o'clock—when the sun was about an hour high—the defendant left his lot, alone, and went west across his field towards the house of his father, about a mile distant. He did not start towards Carpenter's house, but could have left the direction in which he was going, and gone to Carpenter's. He had his Winchester gun with him. He always carried his gun when he left home.

George Hamlin testified, for the defense, that he was at the house of the defendant's father on the fatal morning. Defendant reached his father's said house when the sun was about three quarters of an hour high. It was about that time when the witness saw him in the lot, northwest of his father's house. Defendant remained at his father's house about half an hour and left, going south towards the railroad. Old man Blocker's said house was about two miles distant from the place of the killing. Besides the witness, Alfred Barton and Buck Blocker were at old man Blocker's when defendant reached there on the fatal morning.

Alfred Barton, recalled by the defense, corroborated the testimony of Hamlin, and added that after talking with defendant at old man Blocker's house for perhaps thirty minutes, he went with defendant and Buck Blocker to the railroad to count some ties. They remained there about three hours. When the defendant left, going towards, and saying that he was going to DeKalb. The place where they counted the ties was two or two and a half miles distant from the place where Wood was killed. Witness was not questioned about this matter when previously on the stand. Buck Blocker testified, in effect, about as did the witnesses Hamlin and Barton. He fixed the time when defendant reached his father's house on the fatal morning at an hour or an hour and a half after sun rise, and the hour at which he left the point on the railroad where the ties were counted at half past nine o'clock or ten o'clock.

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Argument for the appellant.

M. P. (old man) Blocker, testifying for the defense, located the hour of the defendant's arrival at his house on the fatal morning, at about seven o'clock. He left about thirty minutes later with Buck Blocker and Alfred Barton.

The defense closed.

G. D. Sims testified, for the State, that, about noon of the day after the killing of Wood, he saw George Baker in Texarkana, going towards the Arkansas line. He had not seen Baker since.

Crawford & Crawford, and *R. D. Harrell*, for the appellant, and in support of the motion for rehearing: 1. The evidence demanded a charge upon murder in the second degree. * * * 5. The court should charge both degrees of murder in all cases, and leave it to the jury to determine for themselves the degree. Article 605 of the Penal Code provides that, "Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this State with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide."

Article 606, Penal Code: "All murder committed by poison, starving, torture or with express malice, or committed in the perpetration or in the attempt at the perpetration of arson, rape, robbery or burglary, is murder in the first degree, and all murder not of the first degree is murder of the second degree."

The distinction in the degrees of murder is predicated solely upon the difference between express and implied malice. Implied malice is constructive malice, and is not a fact to be proved specifically. In order to convict of murder in the second degree the prosecution is only required to show the unlawful killing, and from this fact alone malice is implied. The unlawful killing having been established, the defendant, if he would reduce the offense to manslaughter, must show such facts and circumstances independent of the homicide as would make the offense manslaughter under the law.

On the other hand if, after showing the unlawful killing, the prosecution seeks a conviction for the first degree, it must prove as a fact, independent of the killing, that it was done with express malice. "While the law implies malice on proof of

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voluntary homicide, it does not impute express malice. This is an inference not of law, but a question of fact consisting of intention dependent upon the state of the mind. And to warrant a conviction of murder in the first degree, it must be proven like any other fact in the case by such evidence as is reasonably sufficient to satisfy the jury (not the court) of its existence." (Farrar v. The State, 42 Texas, 272.)

The State might prove a clear and conclusive case of murder in the second degree, and the evidence need not show the existence of a single isolated fact tending to reduce the offense to manslaughter. In such a case the court need not and should not charge upon manslaughter, there being an entire absence of evidence to support such a theory or defense.

But the evidence necessary to establish murder in the first degree always shows every essential to murder in the second degree. To establish the second degree, proof of the unlawful killing alone is necessary. To establish murder in the first degree, you must go one step further—prove one additional fact—that is that it was with express malice. It is simply impossible to prove or make out a case of murder in the first degree without proving every essential element in murder in the second degree. In the language of Judge Hurt, in McLaughlin v. The State, 10 Texas Court Appeals, 361: "It is logically impossible to prove express malice without proving malice, and if the killing be upon malice the offense is murder." But not murder in the first degree. Here is not an absence of evidence necessary to establish a given fact, but a redundancy of proof. In no case can evidence of express malice—we care not how conclusive or convincing the proof may be—disprove implied malice. In every murder trial, where the testimony is of such a character that a charge upon murder in the first degree is demanded, two theories, that of murder in the first and murder in the second degree, are necessarily presented. To establish the first, the State must prove the killing, and as an additional fact must show that it was upon express malice. To establish the second, the State must prove the unlawful killing, and, nothing to extenuate or justify the act appearing, the legal presumption arising from the act of killing alone makes it murder in the second degree.

Every man is presumed to be innocent until his guilt is established by competent evidence. This presumption of innocence attaches as well to the degrees of murder as to the act of kill-

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ing. The plea of not guilty puts in issue not only the act of killing but the degree of the offense. The doctrine of reasonable doubt applies to both, and it is for the jury, and the jury alone, to determine upon a fair and affirmative presentation of the issues whether or not the testimony relied upon to establish express malice overcomes and overwhelms the legal inference arising from the act of killing, and the presumption of innocence as well. In no case has the court the right, either directly or indirectly, to assume that it does. And a failure to charge upon murder in the second degree virtually assumes that the evidence of express malice overwhelms and destroys the proof of implied malice. This is an invasion of the province of the jury. Express malice is a fact—it must be established by the testimony. True, the jury may, from other facts, infer it as a fact, but the court is not authorized to tell the jury, directly or indirectly, that from certain established facts they must infer express malice, or acquit. Negligence is a fact, and its existence or non-existence must be found by the jury from the other facts proven in the case. The law has not undertaken to say what acts are sufficient to constitute negligence, and it matters not what the act is, the court is not warranted in charging the jury that it constitutes negligence. (Railroad v. Murphy, 46 Texas, 366–368.)

The Code has not defined express malice, and the court can not assume that it is proven in any case, no matter what the testimony may be. And where the killing is not controverted, we insist that for the court to charge only on murder in the first degree is virtually to tell the jury that the facts in the case show express malice, and, notwithstanding a correct definition of express malice may be given, the practical effect of such a charge is to direct the minds of the jury to the slayer alone, and not to the motive which prompted the deed.

In Johnson v. The State, 27 Texas, 766, Judge Moore said: "It is only necessary to give such instructions as are applicable to every legitimate deduction which the jury may draw from the facts." This has been often followed, and we freely admit that such is the law.

In Johnson's case the court charged on both degrees of murder, but refused to charge the law of manslaughter. The facts relied upon to reduce the offense to manslaughter were threats made by the deceased. There was absolutely no proof that at

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the time of the killing deceased was attempting to execute the threats. And to this case and all others where there is absolutely no proof of a fact or theory the rule is applicable, but it has no application to cases in which there is a redundancy of proof necessary to establish a fact or theory.

Foster v. The People, 50 New York, 598, is sometimes referred to as supporting the doctrine that the court need not charge upon a degree of crime not shown by the evidence. Properly understood, the case is an authority in support of the proposition which we assume, and is in harmony with the rule declared in Johnson's case. It was a prosecution for murder (the famous car hook case). The New York Statute divides homicide into murder in the first and second degrees. The New York Statute declares that such killing, unless it be murder in the first degree or manslaughter or excusable or justifiable homicide, or when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree. Under this statute those cases only were murder in the second degree in which the killing was by a person engaged at the time in the commission of a felony. Thus, under that statute, in order to reduce a killing to murder in the second degree, you must show as a fact, independent of the homicide, that it was committed by some one engaged at the time in the commission of a felony. There being no evidence tending to show this fact the court correctly refused a charge upon that degree.

Here is a total absence of any proof tending to show that the homicide was committed in the attempt to commit a felony. The court charged "that the defendant could not be convicted of murder in the first degree unless he acted from a premeditated design to effect the death of the deceased, and that in the absence of such an intent his offense was reduced to manslaughter." This charge was correct for the reason that proof of murder in the first degree includes and necessarily establishes every essential element in manslaughter under the New York Code, together with the further and additional fact that defendant acted from a premeditated design to kill. Here the facts present not an absence of proof of manslaughter, but a redundancy of evidence. Just as it is in this State, proof of murder in the first degree necessarily establishes murder in the second degree, and an additional fact, to wit, express malice.

The facts in Foster's case are short. They show a most

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brutal killing. The victim was an unoffending passenger in a street car, and was most cruelly murdered without cause, the instrument being used was an iron car hook. But still the court did not feel at liberty to take from the jury the question as to whether or not it was used with a premeditated design to kill. And we most earnestly insist that in our State it is wrong for the court to take from the jury the right to determine for themselves whether or not the evidence shows a cool, sedate and deliberate mind and formed design to kill or, in other words, express malice. (See Foster v. The People, 50 N. Y., 599.)

A refusal to charge, or a negative charge, necessarily impresses the jury with the idea that in the opinion of the judge presiding, the evidence establishes the higher degree. (10 Texas Ct. App., 357.)

Article 607 of the Penal Code is as follows: "If the jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree, and if any person shall plead guilty to an indictment for murder a jury shall be summoned to find of what degree of murder he is guilty, and in either case they shall also find the punishment."

This is a special provision applicable to this particular offense and must control every general provision. (See art. 5, Penal Code.)

We submit that the plain meaning of article 607 is that in all prosecutions for murder the jury are to determine the degree from a consideration of all the evidence uninfluenced by any opinion of the court, no matter how this opinion may be expressed, and in no case has the court the right to give the jury a peremptory instruction to find a particular degree or acquit. And further, the jury have undoubtedly the power to fix a lower degree to the crime than the statute provides.

W. L. Davidson, Assistant Attorney General, for the State: The position assumed by the appellant, in his motion for rehearing, that in all trials for murder it devolves upon the trial court to instruct the jury upon the law applicable to both degrees of murder, can not be maintained. On the contrary, the established rule is that the trial court shall only give in charge to the jury "the law applicable to the case" as made by the evidence. (Code Crim. Proc., art. 677.)

By the words "the law applicable to the case," is meant the "case" made by the allegations and the evidence adduced on

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the trial. (Kouns v. The State, 3 Texas Ct. App., 13; Stewart v. The State, 15 Texas Ct. App., 598; Cooper v. The State, 22 Texas Ct. App., 419; Parker v. The State, 22 Texas Ct. App., 105; Willson's Crim. Proc., secs. 2335, 2336, 2337, and authorities there cited.)

In Texas a party can only be convicted of the offense charged and proven. If it were otherwise, and defendant be correct in his assumptions as to murder indictments, the jury could convict of either degree of murder without reference to the facts, and the courts would be helpless to remedy the evil because the jury had found the degree, although the testimony might or would indicate a different or inferior degree. Under his theory, a defendant being charged with murder, and the testimony proving that murder of the first degree has not been committed, the court would still be forced to charge upon it, as well as on the second degree, and if the jury convicted of the first degree, their verdict must stand in opposition to the facts, because the jury had found that degree and the statute was imperative in that matter. In that event, the court would be helpless to relieve the party of an unjust punishment.

As insisted upon by defendant, article 607 of the Code, requiring the jury to specify the degree of murder as found by them in their verdict, would absolutely control the charge of the court upon the facts as adduced, and also control his action in passing upon the motion for a new trial.

The fundamental proposition of our system of criminal jurisprudence is that all parties charged with crime are innocent, and until this is overcome, no conviction can take place. This is rooted and grounded in the protection of the citizen against unjust verdicts and unfair trials. It is above and beyond testimony as a fundamental idea, and must be overcome by testimony beyond a reasonable doubt. If the testimony fails, the acquittal follows as a matter of course. If the proof fails to show murder in the first degree, a conviction for that degree will not stand, it is immaterial how often the jury might find that degree. The verdict can not convict of a degree above the proof adduced.

Another fundamental proposition with us is that the charge must conform to, and be limited by, the allegations in the indictment and the evidence thereunder, and the court has no discretion to avoid this, nor any authority to exceed it. The law must be given on the case made, and not on account of de-

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grees in the offense, nor because the jury shall or shall not specify certain things in a verdict. That verdict must be governed by the facts in the case and the charge of the court, and the law of the case. A defendant's rights and liberty and life do not depend upon speculation. The charge must be based upon the case made. Murder in the first degree is fully and definitely defined, and is susceptible of definite proof; positive or circumstantial. Murder of the second degree takes in and includes all other cases of murder not so defined, and this is all murder committed upon implied malice.

Where murder is proven upon express malice, or the grounds set out in the definition of murder in the first degree, no charge is required upon murder in the second degree, because no facts are proven to require that charge. But should the facts be shown that require a charge upon the inferior degree, then it must be given. Then it is the facts of the case that authorize or demand the charge, and not a requirement at the hands of the jury to find of which degree they convict. It is immaterial which degree of murder is charged upon by the court, so far as the specifying of the degree in the verdict is concerned. If murder of the second degree alone is submitted to the jury, and they convict of that degree, still they must specify that degree, because the statute requires it.

If murder of the first degree only is proven, would it be necessary to charge upon murder in the second degree? Of course not. Why? Because that is not the case, under the allegations and proof. Should the court charge upon the theory of murder of the second degree, and a conviction follow, and there were no facts to authorize the charge, a defendant would not be heard to complain, because it was beneficial to him, and the verdict would be sustained upon that theory.

But suppose the indictment was for murder in the second degree, and the court should charge upon murder of the first and second degrees, and the conviction be for murder of the first degree, would it be for a moment contended that that verdict could be sustained? Certainly not. Why? Because no such offense was charged in the indictment. It would be convicting and punishing a party for an offense not charged, and would be depriving him of his life or liberty without "due process of law." If defendant's theory is correct, the verdict would be correct, because, as he says, the court would have no discretion to confine the charge to the allegations and proof there-

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under, but must submit both degrees in order that the jury should have the right to pass on the two degrees. If defendant's position be the law, then the option of the jury to say which degree of murder should be assessed would override the Bill of Rights—the due process of law—the guarantee of the indictment charging the defendant with the offense for which he is to be tried, the right to be tried for the offense charged, and the law which says to him he shall be tried under allegations and the proof made in the case against him. And why and for what purpose? Simply that a jury may have the privilege of saying of which degree the party shall suffer, although not charged or proven.

All this confusion on the part of appellant arises because of his misapprehension of article 607, of the Code. That article only requires the jury to name in their verdict the degree of which they convict, whether of the first or second degree. This they must find under the case as made and given to them, and does not relate back and control the entire case in order that the jury may have the privilege of passing on the two degrees. If so, then the court would forsooth be compelled to submit both degrees, whether the charge was murder of the first or second degree.

Suppose upon the trial a party is convicted of murder in the second degree, and a new trial be awarded, would it be incumbent upon the court to charge upon murder in the first degree upon a subsequent trial? Of course not; and not only so, but it would be fundamental error if he did so, for which the case would be reversed, if a second conviction should be for murder in the first degree, although it gave the jury the right to decide the important question of the degree of murder. Yet it would be a case of murder charged in the indictment.

The court must charge upon the case at bar, as made by the allegations and evidence, and this is the entire matter in a nut shell. If both degrees are submitted, the jury pass thereon and so say in their verdict, and name the degree of which they convict. If the court does not properly submit the issues under the allegations and facts, a reversal follows because of the injury. The jury in this case did specify the degree of which they convicted. An inspection of the facts will show that the court submitted the case made by the allegations and the evidence.

Defendant says that in all cases of murder, murder in both

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degrees must be charged: 1, Because murder is of two degrees; 2, because the jury must find the degree of murder; and 3, where a defendant pleads guilty of murder the jury must pass upon the degree of that offense. In addition to what has been said, I would call attention to article 714 of the Code of Procedure, wherein it is provided, among other things, that murder includes all the lesser degrees of culpable homicide, and also an assault to commit murder.

If defendant's proposition is the law, we would have divers and sundry degrees of "culpable homicide," and every imaginable one of these degrees would have to be submitted, not because the facts warranted or required, but because of the degrees, and in order that the jury might find the degree of the homicide. It is sound and well settled practice that, where the different degrees are submitted the jury must either acquit specifically of all the higher degrees, and name the degree of which they convict, or they must, without naming the higher, mention the particular degree of which they convict; otherwise it is not known of what offense the party is convicted. This holds good through all the degrees from murder to assault to murder. The naming of one offense in the verdict acquits of the higher degrees of that offense.

The broad and unqualified proposition announced by defendant would lead to a charge not only upon the two degrees of murder, but would require a charge upon all "lesser degrees" of homicide, of every phase and character defined in the code, without reference to the facts proven or the case made, simply because under article 714 the same are included as degrees of murder, under an indictment charging that offense. Defendant attempts to gloss this over and avoid its effect by seeking to confine the question to articles 606 and 607 of the Code, where the two degrees of murder are set out and where the verdict is required to specify the degree. Seeing his proposition is too broad, he hedges upon these articles and seeks to control the charge of murder by article 607.

If, as contended, the court has no discretion in the case as made, because the offense has degrees and he is arbitrarily bound to charge all degrees of culpable homicide so that the jury may pass on the same, it would follow that all the "lesser degrees of culpable homicide" would not abridge this great necessity, and the court would be compelled to charge upon every such degree included under the said article 714, where

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murder is charged, and it would be immaterial what the facts were, and it would be equally immaterial at which end of the line the charge began, and whether the indictment charged murder or assault to commit murder. If assault to murder was charged, then the court must charge upward for that degree, and if murder was alleged then the charge must submit the degrees downward from that standpoint. This would be the legitimate deduction from the appellant's broadly stated proposition.

ON MOTION FOR A REHEARING.

WILLSON, JUDGE. In this case the appeal is from a conviction of murder in the first degree, the penalty assessed being confinement for life in the penitentiary.

At our last term at Tyler the cause was submitted on oral arguments and briefs for both parties, and we affirmed the conviction without delivering a written opinion. Counsel for defendant filed a motion for a rehearing and submitted the same upon oral argument and brief, and said motion was transferred to this branch of the court for decision.

It is strenuously insisted by counsel for the defendant that the judgment of conviction should be reversed because the trial court omitted to submit to the jury the issue and law of murder in the second degree. In our first consideration of the case our conclusion was that the evidence adduced on the trial did not present the issue of murder in the second degree, and that therefore the trial court did not err in omitting to instruct the jury as to the law of such issue. After a careful re-examination and reconsideration of the voluminous statement of facts, in the light of the able argument and briefs of counsel for the defendant, we entertain very grave doubts of the correctness of our conclusion.

It is a well settled rule that if from the evidence there is a doubt as to which of two or more degrees of the offense charged the defendant may be guilty, the law as to such degrees should be given in charge of the jury. It is only where there is *no* evidence tending to establish a particular grade of the offense that a charge as to such grade may be omitted. And in a murder case if, by any possible legitimate construction of the evidence, the jury might convict of murder in the second degree, the law of that degree must be given in charge to the jury. (Willson's Cr. Stats., secs. 1064, 2337.)

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Opinion of the court.

In this case there is no direct evidence of express malice on the part of the defendant towards the deceased. It was not shown that the defendant entertained any grudge or any enmity whatever against the deceased, nor does the evidence disclose any motive actuating the defendant to commit the homicide. The only evidence of express malice consists in the character of the weapons used; the manner of their use; that the defendant was accompanied by another person armed with a gun; that defendant, in company with such other person, followed the deceased to the place of the homicide; and that after the killing the defendant and his companion precipitately fled from the scene. That the evidence sufficiently establishes express malice we do not question or doubt, but we are not prepared to say that there is *no* evidence from which a jury might not legitimately conclude and find that the homicide was upon implied and not upon express malice. No witness saw or heard what transpired between the parties at the very time of the killing. It is not known what words, if any, passed between the parties, or what, if anything, provoked the killing. Deceased was armed with a repeating pistol, some of the chambers of which were found to be empty. Entertaining, as we do, a serious doubt of the correctness of our first view of the evidence, and of our conclusion that it did not demand a charge upon murder in the second degree, we shall grant the motion for a rehearing, set aside the judgment of affirmance, reverse the judgment of conviction and remand the cause for another trial.

Counsel for defendant earnestly and ably contend that in all prosecutions for murder in this State, without regard to what the evidence adduced may be, it is the imperative duty of the trial court to submit to the jury the issue and law of murder in the second degree. We have been profoundly impressed with the strength of the reasoning advanced in support of this position. Article 607 of our Penal Code provides: "If the jury shall find any person guilty of murder, they shall also find by the verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty; and in either case they shall also find the punishment." This provision is imperative, and a verdict of guilty of murder, without specifying the degree of murder of which the defendant is found guilty, is a nullity. (Willson's Cr. Stats.,

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sec. 1051.) It unquestionably confers upon the jury the power to fix the crime in the second degree when it ought, under the law and the facts, to be fixed in the first. And a verdict of murder in the second degree will not be set aside upon the ground that the testimony showed the homicide to be one of murder in the first degree. (Monroe v. The State, 23 Texas, 227; Blake v. The State, 3 Texas Ct. App., 581; Parker v. The State, 22 Texas Ct. App., 105; State v. Lindsey, 19 Nevada, 47; Baker v. The State, 4 Texas Ct. App., 223; Powell v. The State, 5 Texas Ct. App., 234.) This power of the jury to find the degree is unrestricted, and can not be controlled or abridged by the charge of the court, or by the omission of the court to submit the issue of murder in the second degree.

It has been held, however, in this State that if the court does not instruct upon murder in the second degree, but the jury finds the defendant guilty of that degree, the conviction can not stand. (Taylor v. The State, 3 Texas Ct. App., 387; Garza v. The State, Id., 286.) The writer is inclined to the opinion that such a verdict must be received by the court and judgment entered in accordance therewith, and that it would operate as an acquittal of murder in the first degree. In accord with the writer's view, it has been held in other States, under statutes similar to ours, that the court can not deprive the jury of their power and right to fix the degree by imperatively instructing them that, if they find him guilty, they must find him guilty of murder in the first degree. (Rhodes v. Com., 48 Penn. State., 398; Lane v. Com., 59 Penn. State, 375; Shaffner v. Com., 72 Penn. State, 61; Robbins v. The State, 8 Ohio State, 193; Beaudien v. The State, 8 Ohio State, 638; The State v. Lindsey, 19 Nevada, 47; The People v. Ah Lee, 60 Cal., 85; The State v. Dowel, 19 Conn., 387; Baker v. The People, 40 Michigan, 411; The People v. Williams, 73 Cal., 533; see also Whart. on Homicide, secs. 186, 198.) Such an imperative instruction is regarded as an unwarranted assumption of the province of the jury, and will vitiate a conviction of murder in the first degree.

We have found no authority, however, which directly holds that an omission to submit to the jury the issue and law of murder in the second degree, where the evidence conclusively shows murder in the first degree, presenting no facts from which a jury might legitimately find murder in the second degree, will vitiate a conviction for murder in the first degree.

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Opinion of the court.

In this State the decisions are numerous and uniform the other way, holding that where there is *no* evidence from which, by any possible legitimate construction, the jury could conclude that the homicide was murder in the second degree, the court may properly decline to submit to the jury the issue and law of murder in the second degree. It was so held by our Supreme Court in the early case of O'Connell v. The State, 18 Texas, 343. The rule laid down in that case has been followed by a long line of decisions. (Washington v. The State, 1 Texas Ct. App., 647; Taylor v. The State, 3 Texas, Ct. App., 387; Hubby v. The State, 8 Texas Ct. App., 597; Lum v. The State, 11 Texas Ct. App., 483; Neyland v. The State, 13 Texas Ct. App., 536; Davis v. The State, 14 Texas Ct. App., 645; Gomez v. The State, 15 Texas Ct. App., 327; Darnell v. The State, 15 Texas Ct. App., 70; Smith v. The State, 15 Texas Ct. App., 139; Rhodes v. The State, 17 Texas Ct. App., 579; Jackson v. The State, 18 Texas Ct. App., 586; Johnson v. The State, 18 Texas Ct. App., 385; Bryant v. The State, 18 Texas Ct. App., 107; May v. The State, 21 Texas Ct. App., 595; Henning v. The State, 24 Texas Ct. App., 315; Trimble v. The State, 25 Texas Ct. App., 631.) These decisions have been the law of this State for many years; have met with the tacit sanction and approval of the bar and the Legislature of the State. We shall adhere to them as the established law of the land in cases coming within their purview. We take occasion, however, to suggest to trial judges that they should be exceedingly cautious in murder trials in declining to charge upon murder in the second degree. Instances are comparatively rare in which such a charge may be properly dispensed with. It is only when there is *no* evidence tending to present that issue that such a charge may be safely omitted.

We have not discussed other questions of minor importance presented in the record, because they are of a character not likely to occur on another trial.

Upon the ground before stated the rehearing is granted, the judgment of affirmance is set aside, and the judgment of conviction is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

Opinion delivered January 16, 1889.

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Statement of the case.

No. 2551

WILLIAM TAYLOR *v.* THE STATE.

1. THEFT—INDICTMENT—VARIANCE.—The indictment alleged the name of the owner of the stolen property to be Burris. The proof showed it to be Burrows. The conviction is assailed upon the ground of variance between the ownership as alleged and proved. But *held* that, as the proof further shows that the owner was commonly known as Burris, the variance is not material.

SAME—PRACTICE—ALIBI—NEW TRIAL.—The only inculpatory evidence against the accused was the testimony of two witnesses to the effect that, subsequent to the theft of the property, they saw the same removed from a place of concealment by three parties, one of whom they believed, but were not positive, was the defendant. In anticipation of this evidence, the defendant applied for a continuance to secure a witness by whom to establish his presence at another place at the time the property was removed from the place of concealment. Being denied the continuance, and convicted, the defendant asked for new trial because of the ruling of the court upon his application for continuance. The new trial was refused upon the ground (as was the continuance) that the proposed alibi did not cover the time of the theft of the property. *Held*, that the action of the trial court was error, not only because of the inherent weakness of the inculpatory proof, but because an alibi is available, not merely to meet the main issue in the case, but any criminative fact relied upon by the State.

APPEAL from the District Court of McCulloch. Tried below before the Hon. J. C. Randolph.

The conviction in this case was for the theft of a horse, and the penalty assessed by the verdict was a term of five years in the penitentiary.

The only testimony in the record in any way connecting the defendant with the alleged stolen horse is the testimony of the State's witnesses Webster and Pride, the substance of whose narratives is set forth in the opinion of the court. The evidence otherwise discloses the disappearance of the horse from the possession of the owner and its subsequent recovery by him.

No brief on file for the appellant

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

HURT, JUDGE. This conviction is for the theft of a horse, the property of one Burris. The indictment alleged that the horse was the property of Burris, whose first name was unknown to the grand jurors. The name of the owner was not Burris, but Burrows. Appellant claims a variance. Burris being alleged as the owner, this must be proved. How? Either by proof that the owner's name was in fact Burris, or that he was commonly known by that name. If commonly known by that name, then for the purposes of this prosecution it would be his name, the allegation would be true, and hence there would be no variance. The record contains ample proof that the owner of the horse was commonly known by the name of Burris.

On the twenty-third of January, 1887, on Sunday evening, in a deep hollow, in a secluded place, the horse alleged to have been stolen was found, tied to a bush. Witnesses Webster and Pride, believing that the horse had been stolen and hidden in this place, concealed themselves in a kind of thicket about sixty or seventy-five yards from the horse, to watch and detect the thief. They stated that about sundown of the same evening they saw three men come and get the horse and take him away. Webster states that he took Lee Anderson to be one of the party, and that "he took defendant to be one." The other he did not know. Anderson got the horse. The man he took to be defendant was riding a sorrel horse pony. Defendant owned a sorrel pony. The man he took to be defendant was riding a sorrel pony which he took to be defendant's pony. Webster had known defendant about six months, and to the best of his belief defendant was one of the party.

Pride swears to the same facts substantially, with this difference: He states that he "took" defendant to be one of the party, but would not be positive. The others he took to be Richard and Lee Anderson. That he had known defendant four or five years.

If appellant was one of the three men who were seen by Webster and Pride on the occasion when the horse was taken from its place of concealment, on Sunday evening about sun down, under the facts of this case the verdict of the jury should be sustained. But the criminative facts, the facts from which the main fact is to be inferred, must be clearly proven; because, if a mistake should be made in these (the criminative facts) it

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will be carried into the conclusion, and no conclusion can possibly be more certain than the facts from which it is drawn.

It is evident that neither Webster nor Pride were certain that appellant was one of the party; nor were they certain that the sorrel pony was defendant's pony. Now, it would not be correct reasoning to presume a certainty, to wit, the guilt of the accused, from uncertainties. (Burrell on Cir. Ev., 136.) Eliminate this transaction from the case, and there remains no fact from which anything appears but suspicion.

To show that Webster and Pride were not correct in believing that appellant was with the Andersons when the horse was taken from the place where concealed, on Sunday evening, appellant moved to continue the case for the want of a witness by whom he states he could prove that he was at another place when the horse was taken from the gully on Sunday at sun down. The learned trial judge refused to continue, and overruled the motion for new trial upon this ground for the reason that the alibi did not cover the time when the horse was stolen. This may be true, and would be sound reasoning if the State had testimony to the actual taking of the horse—the theft. But the State relies for conviction upon connecting appellant with the horse at the gully on Sunday evening after the horse had been stolen. This being the case, clearly appellant should have the right to meet this matter by showing that he was not there, but at another place; and this he would have the right to do if the horse had been stolen long prior to the time when found concealed in the gully. An alibi can be relied upon to disprove or surround with doubt, not only the main fact, but any criminative fact relied upon for conviction.

We are of opinion that a new trial should have been awarded appellant to enable him to procure the testimony of the witness, and as he states he can, show that he was not with the Andersons when they got the horse from its place of concealment

We will not pass upon the sufficiency of the evidence to support the verdict; holding that its inherent weakness rendered the action of the court in refusing a new trial based upon the motion to continue the case, error for which the judgment must be reversed.

The other grounds relied upon for a reversal of the judgment are not well taken.

Reversed and remanded.

Opinion delivered January 16, 1889.

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Statement of the case.

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No. 2532.

ALBERT WILSON v. THE STATE.

1. PERJURY—INDICTMENT—EVIDENCE.—It is essential in a perjury case not only that the indictment shall allege that the court before which the judicial proceeding in which the perjury is charged to have been committed had jurisdiction of such judicial proceeding, but that fact must be established by the proof.
2. SAME—COMPLAINT—INFORMATION—CASE STATED.—Under the law of this State, an information is insufficient for any purpose unless founded upon a complaint, filed therewith, charging an offense. The indictment in this case charged that the perjury was committed on the trial of a judicial proceeding in the county court "wherein one Bean was duly and legally charged by information," etc. To support the allegation of jurisdiction of the county court, the State introduced in evidence the information, but not the complaint. *Held*, that the proof was insufficient.
3. SAME—PRACTICE—CHARGE OF THE COURT.—To charge the jury, in felony cases, upon the law applicable to the case, whether asked or not, is under our law a duty imposed imperatively upon the trial judge. It is an express provision of our statute that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statements under oath, or upon his own confession in open court." The trial being upon the plea of not guilty, and not upon confession in open court, the omission of the trial court to give in charge to the jury the substance of the above statutory provisions was fundamental error.
4. SAME—TERM DEFINED.—A "credible witness," as used in the statute, means "one who, being competent to give evidence, is worthy of belief."

APPEAL from the District Court of Fayette. Tried below before the Hon. H. Teichmueller.

The conviction in this case was for perjury and the penalty assessed against the defendant was a term of five years in the penitentiary.

The indictment alleges, in substance, that on the seventeenth day of April, 1888, one William Bean was tried in the county court of Fayette county, for carrying a pistol on the twenty-fifth day of February, 1888; that, the State having proved by several witnesses that a difficulty occurred on the night of said

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day, in a certain room of a certain house, between one W. Dulix and one T. Edwards, and that the said Bean, at the time of the difficulty, was present in the said certain room of the said certain house, armed with a pistol, the said Bean introduced the defendant as a witness in his behalf, and the defendant, after being sworn, testified on the said trial that the said Bean was not in the said room nor in the said house at the time the difficulty occurred, but was outside of the same, in company with him, this defendant, and others. This said testimony of the defendant is the perjury assigned.

To support the allegation in the indictment that the county court had jurisdiction of the prosecution against Bean for carrying a pistol on the night of February 25, 1888, the State introduced in evidence the information of the county attorney charging Bean with that offense. The county clerk testified that he administered to the defendant the witness oath on that trial, and the attorney who represented the State testified that, on that trial, this defendant testified in behalf of Bean as charged in the indictment, which, upon the question at issue, was contradictory of evidence introduced by the prosecution against Bean. Several witnesses testified that they attended a dance at the Doss house in LaGrange, on the night of February 25, 1888. During the evening a difficulty occurred in the side room of the said house between Willis Dulix and Tom Edwards, and during that difficulty Bean was in the said room. One witness testified positively that Bean had a pistol in his hand while in the said room, and another witness stated that he was unable to determine whether the object Bean had in his hand at that time was a pistol.

Two witnesses for the defense testified that this defendant's reputation for truth and veracity was good. Another testified that, about five minutes before the shot was fired in the Doss house, he saw the defendant at the fence which surrounded the said house.

W. H. Ledbetter, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. In all cases of prosecution for perjury committed in a judicial proceeding, it must be made to appear by the allegations of the indictment that the court had

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jurisdiction of the judicial proceedings (Willson's Crim. Stats., sec. 307), and it is equally important and necessary that the evidence should sustain the allegation in order to warrant a conviction. It was alleged in the indictment in this case that the judicial proceeding was a trial in the county court "wherein one Bean was duly and legally charged by information" with unlawfully carrying on or about his person a pistol, etc. To sustain this allegation the prosecution simply introduced in evidence the information. This was not sufficient. An information can not be presented until oath has been made by some credible person charging the defendant with an offense. (Code Crim. Proc., art. 431.) This oath is called a complaint. It is the basis and foundation upon which the information rests, and is a necessary part of, and must be filed with, the information. (Code Crim. Proc., art. 36.) Without a complaint an information would be wholly invalid—would confer no jurisdiction upon the court, and would be worthless for any purpose. (Willson's Crim. Stats., sec. 1999.) It follows, then, that in order to sustain an allegation of judicial proceeding by information, not only must such information be introduced in evidence but the complaint upon which it is based or founded, must be also introduced.

Another error, fundamental in character, appears upon this record. It is a fatal omission in the charge of the court to the jury. An express provision of our statute with regard to perjury and false swearing is that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath, or upon his own confession in open court." (Code Crim. Proc., art. 746; Hernandez v. The State, 18 Texas Ct. App., 134; Anderson v. The State, 24 Texas Ct. App., 106; Maines v. The State, 26 Texas Ct. App., 14.)

Article 746, as thus quoted, is as much a part of the law of perjury as any other found in our Penal Code relative to that crime, and where the accused has not confessed his guilt in open court, that article, or the substance thereof, should be given in charge to the jury, it being imperative in felony cases that the charge "shall distinctly set forth the law applicable to the case, whether asked or not." (Code Crim. Proc., art. 677.) It is fundamental error to fail to give such instruction. (Wash-

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ington v. The State, 22 Texas Ct. App., 26; Gartman v. The State, 16 Texas Ct. App., 215; Willson's Crim. Stats., sec. 312.)

"A credible witness," as used in that article, means "one who, being competent to give evidence, is worthy of belief." (Smith v. The State, 22 Texas Ct. App., 197.)

For the errors discussed, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 16, 1889.

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No. 2584.

WILLIAM SMITH *v.* THE STATE.

1. PERJURY—EVIDENCE—CASE APPROVED.—Note the approval of Wilson v. The State, *ante*, to the effect that without a supporting affidavit an information is not sufficient evidence of jurisdiction alleged in the indictment, and that the omission of the trial court, on trial for perjury, to give in charge to the jury the substance of article 746 of the Code of Criminal Procedure, is fundamental error. But note that the errors in this respect, committed upon the trial of Wilson's case, were not committed upon the trial of this case.
2. SAME—INDICTMENT which conforms to No. 122 of Willson's Criminal Forms is sufficient to charge the offense of perjury.
3. PRACTICE—CHARGE OF THE COURT.—It is a rule of practice in this State that special instructions, whether given or refused by the trial judge, must be authenticated by his signature, and if the record fails to show that such instructions were refused, the Appellate Court will presume that they were given.
4. SAME.—Special instructions are properly refused when it appears that to the extent they were correct they were embodied in the general charge.
5. SAME.—The materiality of matter assigned as perjury is a question to be determined by the court, and not by the jury. A special instruction announcing the converse as the rule was properly refused.
6. SAME—PRIVILEGE OF COUNSEL.—In his concluding argument the counsel for the defense stated to the jury that the State's counsel, in closing the case, would have something to say about why P. and W. and E. (all of whom were shown to be indicted for the same offense) were not put on the stand by the defense, and that the reason they were not called to the stand was that, if called, the prosecuting officer would indict them again for perjury. In reference to this matter the State's coun-

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sel, in concluding the argument, stated that all of the parties named, except W., who had been convicted, could have been called to testify without danger of indictment if they testified to the truth. *Held*, that the remarks of the State's counsel, being responsive to the argument for the defense, were legitimate.

APPEAL from the District Court of Fayette. Tried below before the Hon. H. Teichmueller.

This is a companion case to that of Wilson v. The State, which immediately precedes it. The perjury assigned is the same in each case, and the penalties assessed by the juries is the same — confinement in the penitentiary for five years.

The same witness who testified in the Wilson case testified in this case, proving against this defendant substantially the same facts that were proved against Wilson. It also appeared in evidence in this case that Wilson, Phillips and Edwards were under indictment for the same offense, viz., testifying to the same false statement on the trial of Bean.

Phelps & Lane, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This is a companion case to that of Albert Wilson v. The State, just decided, and was a prosecution for perjury committed in the same judicial proceeding, and assigned upon the testimony of this defendant given as to the same subject matter. But in this case the errors for which the Wilson case has been reversed have not been committed. In this case the complaint upon which the information in Bean's case was based was introduced in evidence, and the charge of the court substantially complied with the provisions of article 746, Code Criminal Procedure, relative to the testimony essential to a conviction. Defendant's motion to quash the indictment was properly overruled, the indictment being in all essential particulars in substantial compliance with the law and with the approved forms and previous adjudications upon the validity of indictments in such cases. (Penal Code, art. 188; Willson's Crim. Forms, No. 122 and notes 1 and 2; Willson's Crim. Stats, sec. 308, and especially under the head "Materiality.")

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Opinion of the court.

No exception appears to have been taken to the charge of the court as given, and it does not appear that defendant's special requested instructions were either given or refused, there being no indorsement by the judge upon them. Taken as a whole, the achrge, in our opinion, sufficiently submitted the law of the case in regard to the matters complained of, especially in the absence of exceptions as to any particular portion, and in fact it could not be said to be defective, even had such exception been reserved, because in its entirety it presented the law fully and in a manner so that the jury could not have been misled, to the prejudice of defendant.

As to defendant's special requested instructions, the rule is: "If requested instructions are 'given' or 'refused,' they must be authenticated by the judge's signature; and when nothing indicates that they were refused, it will be presumed on appeal that they were given." (Willson's Crim. Stats., secs. 2354, 2355, 2366.) It is true that one of the grounds of defendant's motion for new trial, and one of the assignments of error, is the refusal of the court to give these special instructions. Suppose this entitled them to consideration as refused instructions, then it appears from said instructions that those which were legal had already been substantially given in and covered by the general charge, and the others, to wit, the third, fourth and sixth, should not have been given because *the materiality* of the false statement assigned as perjury is a question for the court and not the jury to determine. (Jackson v. The State, 15 Texas Ct. App., 579; Davidson v. The State, 22 Texas Ct. App., 372; Donahoe v. The State, 14 Texas Ct. App., 638; Washington v. The State, 23 Texas Ct. App., 336.) There was no error in refusing said instructions.

The only remaining supposed error is presented in defendant's bill of exceptions number two, as to remarks made by the district attorney in his closing argument. These remarks were in reply to matters commented upon by defendant's counsel, and were perfectly legitimate under the circumstances; and, were it otherwise, no harm or prejudice to defendant's rights is made to appear on account of said remarks. (Bass v. The State, 16 Texas Ct. App., 62; House v. The State, 19 Texas Ct. App., 227; Pierson v. The State, 18 Texas Ct. App., 524.)

We have failed to find any reversible error in this record, and the judgment is therefore affirmed.

Opinion delivered January 16, 1889. *Affirmed.*

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No. 2585.

E. KORITZ v. THE STATE.

1. PRACTICE—AMENDMENT—APPEAL BOND OR RECOGNIZANCE FOR APPEAL must be entered into at the trial term, and can not be amended after an appeal has been perfected.
2. NO SUCH OFFENSE AS MALICIOUS MISCHIEF is known, *per se*, to the law of this State, and an appeal from a conviction for unlawfully breaking and pulling down and injuring the fence of another must be dismissed when the recognizance for appeal describes the offense as malicious mischief.

APPEAL from the County Court of Washington. Tried below before the Hon. Lafayette Kirk, County Judge.

The opinion discloses the case. A fine of five dollars was the penalty assessed.

Bassett, Muse & Muse, for the appellant.

W. L. Davidson. Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant was convicted in the court below upon an information charging him with breaking, pulling down and injuring the fence of another, in violation of article 684, Penal Code. Judgment was entered against him on the twenty-first of November, and, his motion for new trial having been overruled, he gave notice of appeal, and on the ninth of December entered into recognizance in open court to perfect his appeal. In this recognizance it was recited that he was charged in the county court with, and had been convicted of, "malicious mischief." The county court adjourned its term on the ninth day of December, the day upon which the recognizance for appeal had been entered into.

On the twenty-eighth of December, after adjournment and during vacation, defendant filed an application in the nature of a petition with the county judge to have his recognizance amended or corrected so as to show that, instead of "malicious mischief," the offense charged against him, and of which he had been convicted, was "unlawfully breaking and pulling down and injuring the fence of another," etc. To this applica-

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tion the county attorney filed exceptions, which may be summed up to the effect, viz., that the county court had no jurisdiction over the matter, for the reason that the cause had been appealed to the Court of Appeals and the appeal perfected; that to allow a change or correction of the recognizance in the manner sought would be tantamount to allowing a new recognizance to be given, and that a recognizance for appeal could only be entered into during the term at which the conviction was had; and that the court could not enter *nunc pro tunc* at a subsequent term a sufficient recognizance to supply the place of a defective recognizance, after appeal had been perfected. At a hearing of the application in chambers, the county judge overruled the exceptions of the county attorney to defendant's application or motion, and then overruled said application and motion, and refused to amend and correct the recognizance; to all of which the defendant saved his bill of exceptions, and submits the same for error to this court.

As we understand it, the question presented has already been substantially decided by this court in Grant's case (8 Texas Ct. App., 432), where it was said: "The practice of amending recognizances after the term would tend to beget laxity and confusion in the administration of the law, and might oftentimes frustrate justice in this class of cases." "The recognizance must be perfected during the term, and can not be amended or entered *nunc pro tunc* at a subsequent term." (Willson's Crim. Stats., secs. 2648–2650.) And after the appeal has been perfected to this court, we know of no authority giving the court below jurisdiction to amend the recognizance which has been given to perfect the appeal. The court below did not err in overruling defendant's application to amend and correct the recognizance.

A motion is here made by the Assistant Attorney General to dismiss this appeal because the recognizance states no specific offiense against the law. The offense stated in the recognizance is "malicious mischief." There is no such offense *per se* known to our law, and the motion must be sustained and the appeal dismissed. (McLaren v. The State, 3 Texas Ct. App., 680; Killingworth v. The State, 7 Texas Ct. App., 28; Waterman v. The State, 8 Texas Ct. App., 671; Morris v. The State, 4 Texas Ct. App., 554.) Motion granted and appeal dismissed.

Dismissed.

Opinion delivered January 18, 1889.

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Statement of the case.

No. 2543.

J. O. RIGBY v. THE STATE.

OFFICIAL PECULATION—INDICTMENT—INTERPRETATION OF THE CODES. In the construction of a statute, the legislative intent, if that intent can be ascertained, must govern even over the literal import of words, and without regard to grammatical rules. Thus construed, article 250 of the Penal Code inhibits any officer of a county, city or town from entering into, on account of himself, any kind of financial transaction with such corporation. The indictment in this case charged the accused with the violation of said article, in that he sold a mule to the county of which he was a county commissioner. *Held*, that such sale constituted a violation of said article, and the indictment was sufficient.

APPEAL from the District Court of Goliad. Tried below before the Hon. H. C. Pleasants.

The opinion states the nature of the case. The penalty imposed by the jury was a fine of fifty dollars.

The proof showed that the commissioners court of Goliad county, after examining the statutes, and among them article 250 of the Penal Code, as to its power to appoint an agent to purchase mules for the use of the county, directed the defendant, one of its members, as its agent to purchase the two mules for the said county. Defendant purchased one mule from R. L. Turner, and reported to the commissioners court that he owned a mule which he was willing to sell the county for the sum of one hundred dollars. The proposition was accepted by the commissioners court, and the sale of the mule was ratified, and the same paid for by the county treasurer upon the order of the said court. It was proved and not disputed by the State that the actual value of the mule sold by defendant to the county was the sum paid for it,—one hundred dollars.

No brief on file for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

WILLSON, JUDGE. Article 250 of the Penal Code is as follows: "If any officer of any county in this State, or of any city or town therein, shall become in any manner pecuniarily interterested in any contract made by such county, city or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work, or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emoluments or advantage whatsoever, in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in a sum not less than fifty nor more than five hundred dollars."

This appeal is prosecuted from a conviction had under said article, the indictment charging in substance that the defendant, while a county commissioner of Goliad county, sold to the said county two mules, and received therefor, from said county, two hundred dollars. The defendant excepted to the indictment upon the ground that it did not charge any offense against the law; which exception the court overruled. It is contended by the defendant that the article of the Penal Code above quoted does not inhibit a county officer from selling property to the county unless such property was *made for or on account of such county;* that the word "made" in said article refers to the word "anything," and not to the words "purchase or sale." We do not agree to such construction of the article. We admit that the language of that portion of said article, when considered without reference to the context, or without inquiry as to the legislative intent would warrant the interpretation contended for by the defendant.

But, when viewed in connection with the context, and with reference to the purpose which the Legislature intended to effect by the enactment of the statute, such an interpretation would, in our judgment, be too restricted, if not strained and unreasonable. Manifestly, the Legislature, in enacting the statute, intended thereby to protect counties, cities and towns from official peculation. Such peculation was the evil sought to be suppressed, and the statute strikes at the very root of the evil, by making it an offense for any officer of a county, city or town to become interested pecuniarily in matters wherein

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such corporations are pecuniarily interested. The purpose of the statute is to prevent official "rings" from being formed and operated to prey upon the treasuries of counties, cities and towns; to prevent the officers of such corporations from using their official knowledge and influence to their individual pecuniary advantage in the financial transactions of such corporations. The objects of the statute would be but partially attained if such officers are to be permitted to deal with their corporations in the sale and purchase of property. We can perceive no reason why a county officer should be permitted to sell a mule to his county, and yet be denied the privilege of making a wagon or other article of property for the county for a consideration.

In the construction of a statute, the legislative intent, if that intent can be ascertained, must govern even over the literal import of words, and without regard to grammatical rules. (Willson's Cr. Stats., secs. 17-26.) Our construction of the statute is that it inhibits any officer of a county, city or town from selling to or purchasing from such corporation any property whatever. This construction does not, we think, do violence to the language of the statute, and is the only construction which will accord with what we believe to be the intent and purpose of the statute.

We therefore hold that the indictment charges an offense against the penal law of this State, and that the exception was properly overruled. We have found no error in the conviction and the judgment is affirmed.

Affirmed.

Opinion delivered January 19, 1889.

No. 2626.

BUD REVEAL v. THE STATE.

THEFT—EVIDENCE—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction for horse theft, because it does not overcome the presumption of innocence nor exclude the reasonable doubt.

APPEAL from the District Court of Milam. Tried before the Hon. J. N. Henderson.

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Statement of the case.

This conviction was for the theft of a horse, and the penalty assessed against the defendant was a term of five years in the penitentiary.

Gordon Cook was the first witness for the State. He testified that he lived in Milam county, Texas, about three miles from the town of Buckholts, and lived at that place in 1887. His certain small bay horse disappeared from the range near that place, in the spring of 1887. That animal was branded BF on the right shoulder. The witness searched the range three days but failed to find his horse. He then employed the son of old man Strickland, from whom he bought the animal, to search the range, but he, too, failed to find him. The witness inquired of his neighbors, including each of the Bryants, but got no information about his horse. He did not ask the defendant about the animal. On one Sunday morning in the fall of 1887, one Rudy McDaniel, riding the said horse, passed the witness and John Bryant, who were traveling together. The point where McDaniel passed the witness and Bryant was about half a mile due south from witness's house. The witness claimed the horse and told McDaniel to take him to his, witness's, house. Defendant and J. L. Bryant, who were half brothers, knew witness's said horse. When witness asked J. L. Bryant if he had seen the animal, he told said Bryant that the brand was BF on the left shoulder. J. L. Bryant was now in attendance upon this court as a witness for the defendant.

Cross examined, the witness said that there was no other than the BF brand on the horse when it disappeared, so far as he knew. When McDaniel, riding the horse, passed the witness and John Bryant, the said Bryant remarked to the witness: "That is your horse." Witness, who did not observe the animal as McDaniel passed, stopped him, and, after examining the horse fully, identified it. The BF brand was still on the right shoulder, and the letters NS had been branded on the left hip. Defendant lived in Bell county. McDaniel lived on the edge of Milam county, about seven miles distant from and across the river from the defendant. The said horse was the property of the witness, and was taken from his possession in Milam county without his consent.

Floyd Bankston was the next witness for the State. He testified that he knew the animal involved in this prosecution. He saw that horse, on or about April 25, 1887, staked on a small prairie about fifty yards distant from the house of Mrs. Syl-

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Statement of the case.

vester, which house was situated in Bell county, about half a mile distant from the Milam county line. Mrs. Sylvester was the mother-in-law of the defendant, and he lived at her house. While the animal was at Mrs. Sylvester's place, the witness saw the defendant brand a bar across the BF on the right shoulder, and brand the letters NS, which was Mrs. Sylvester's brand, on the left hip. There were two BF brands on the right shoulder,—one immediately above the other. Witness asked defendant why he was barring out the BF brand, and he replied that it was easier to bar it out than to run a counter brand. One of the BF brands was much dimmer than the other, but was plain enough to be seen. The witness afterwards traded with the defendant for that horse, and after that, traded it to Joel Reed. Reed subsequently traded the horse off, as he understood Reed, to John Morris. On his cross examination the witness said that, so far as he knew or could observe, the defendant, while he had the horse at Mrs. Sylvester's, made no effort to secrete him. He rode that horse about the country to the knowledge of the witness, and once, at least, put him into Mrs. Sylvester's field. When witness first found defendant in possession of the horse, the defendant, in reply to his question, told witness that he got the said horse in a trade with a man across the river. The town of Buckholts was in Milam county, north of Little river. Defendant lived in Bell county, south of Little river.

John Morris testified, for the State, that he knew the little bay horse involved in this prosecution. He saw that horse in the possession of the defendant on or about April 25, 1887, at the place where he lived, in Bell county, above a place known as the "Nigger Lease." The witness afterwards traded for that horse with Joel Reed. The horse, when witness first saw him, had the BF brands on the right shoulder—one brand being immediately above the other. The lower of the two said brands was quite plain, but the upper one was dim, and could be deciphered only at close quarters. When witness next saw him, on May 3, the BF brands had been barred out, and the letters NS branded on the left hip. When the witness first saw the horse in the possession of the defendant he told witness that he got the animal when a colt, from his uncle,—trading his uncle a yearling; that the horse soon ran away from him, and that he had just recovered him. Witness traded off the horse to Zeke Underwood. On cross examination the witness

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stated that he did not, on a former trial of this case, testify that defendant told him he got the horse from "a man across the river." He did not remember whether or not he testified on that trial that defendant told him that he got the horse from his uncle. He did not think he was asked what defendant told him about how he acquired the horse.

Ned Barrett testified, for the State, that he frequently saw the Gordon Cook bay horse in defendant's possession, early in 1887. Defendant then kept him staked in a "thickety" place in Reed's pasture. He had other horses in that pasture, but did not keep them staked. A number of men worked on Reed's place and kept their horses in Reed's pasture.

The State closed.

Fayette Bryant was the first witness for the defense. He testified that he and defendant were half brothers. He knew one George May. He knew the horse involved in this prosecution. He first saw that horse about the middle of April, 1887, in the town of Buckholts, in Milam county. Some horse races were run at that town on that day. Among the large number of people who attended that race was George May. He came to the race track riding a black horse and leading the bay horse involved in this prosecution. May offered to bet the bay horse on the races. About three o'clock on that afternoon, in the presence of the witness, in the town of Buckholts, the defendant traded with May for that horse, giving him the brown pony which he rode to Buckholts, in exchange. Defendant then mounted the bay horse, and rode him home. Mack Clark and a person whom witness could not now name were present and witnessed the trade.

On his cross examination the witness said that, when acquired by the defendant, the horse was not fat, but was in very fair condition. He had no swelling on the back nor bruises on the head that witness observed. Witness did not critically observe the brown pony. He had seen the brown pony in the defendant's possession previous to the race. Defendant rode the said brown pony from his home to the horse race, spending the night before the race at the house of his half-brother, Jesse Bryant. Witness did not know where defendant got the brown horse, nor how long he owned him.

Bud Robinson testified, for the defense, that he saw the defendant and George May in attendance upon the horse race near Buckholts on the occasion referred to by the preceding

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Opinion of the court.

witness. May came to the race on a black horse, leading a bay pony. May attempted to bet the bay pony on the races. Failing, he took the animal back to town where he attempted to sell it to witness. Witness declined to buy, when the defendant, who was standing near, said to May: "I will give you a trade for the pony." Witness did not stay to witness the negotiation. The bay pony was in fine condition, and had no sores or bruises that the witness observed.

The defense closed.

Three witnesses testified, for the State, in rebuttal, that they knew all of the stock that the defendant owned about his home at the time of the horse race, and prior thereto. He did not then own a brown pony. He may have owned a brown pony that was kept elsewhere. Bankston, recalled for the State, testified that, when defendant brought the pony home, the said pony was very poor, had bridle bruises on its head, and a running sore on its back as large as a man's fist.

E. L. Antony, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. A witness in behalf of the defendant testified positively that the defendant acquired the alleged stolen horse from one May, by trading to said May therefor a brown horse; that this occurred prior to the time when the witness for the State saw defendant in possession of the stolen horse; that May brought the said horse to a place where many people had assembled on the occasion of a horse race, and endeavored to bet the same on said race, and, failing in this endeavor, proposed to sell or trade said horse, and that defendant traded for the horse as aforesaid. There is no testimony directly assailing the credibility of said witness, or directly contradicting any of his testimony. It was corroborated to some extent by the testimony of another witness, who testified that he saw May at the race with a horse similar in description to the stolen horse, and heard May and the defendant discussing a trade about said horse.

To destroy the effect of this defensive testimony, the State proved negatively by several witnesses that they were acquainted with the property owned by the defendant, and he did not own a brown horse at the time of the alleged trade, within

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their knowledge. It was also proved that on one occasion, while the defendant had possession of the stolen horse, he stated that he had got him "from a man over the river," and on another occasion he stated that he had got him "from his uncle." It is shown by the evidence that, if he got the horse from May, the first statement is true. As to the second statement, the evidence shows it to be untrue. These statements were casually made by the defendant when he did not know that he was suspected of the theft of the horse, and without his right to said horse being called in question. Having been made under such circumstances, they can not be regarded as entitled to much consideration. Their criminative force is weak—too weak to overcome the presumption of innocence, when that presumption is supported by positive evidence.

As to the negative testimony that the defendant did not own a brown horse at the time of his alleged trade with May, it is entitled to but little, if any, weight. He may have owned such a horse without the knowledge of the witnesses. He may not have owned such a horse, and yet he may have traded such a horse to May. It was incumbent on the State, we think, to meet the defendant's proof of a lawful acquisition of the stolen horse by more satisfactory evidence than was adduced. If May did not in fact trade the horse to the defendant, and did not have said horse in his possession at the race, it is reasonable to suppose that these facts could readily be established, as the race and the alleged trade took place in the county of the prosecution, and many persons were present at the time and in the town where the trade is stated to have occurred.

After a careful consideration of the evidence before us, we conclude that it does not sustain the conviction. It does not establish the guilt of the defendant to the exclusion of a reasonable doubt, in our minds, and we are unwilling to sanction the conviction upon the evidence.

The judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Opinion delivered January 19, 1889.

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Syllabus.

No. 6161

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MASON MILLER *v.* THE STATE.

1. PRACTICE — EVIDENCE — DYING DECLARATIONS — PREDICATE.—As a necessary predicate for the admission in evidence of dying declarations, it must be established that the declarant, when he made them, was under the sense of impending death, and was sane. Consciousness of approaching death is provable, not merely by the solemn protestations of the dying person, but by any circumstance which sufficiently shows that when he made the declarations he was under the sense of impending death. See the opinion and the statement of the case for evidence *held* sufficient to establish the necessary predicate for the proof of dying declarations.
2. SAME—THREATS.—The defendant having introduced evidence of threats against his life, uttered by the deceased, a short time before the homicide, the State, over defendant's objection, was permitted to prove that, about a year before the homicide, the defendant told a witness that the "threats of John Collier (deceased) did not amount to any more than those of an old woman." *Held* that objection to this proof was properly overruled.
3. SAME—PRIVILEGE OF COUNSEL.—Special counsel for the State, in the concluding argument for the prosecution, stated to the jury that "the defense of an insult to a man's wife is set up in two-thirds of the cases in this county;" that, "when before the grand jury the witness Rose made no such statement as that he picked a pistol up from the ground;" that "he knew John Collier well, and that he was an honest and truthful man," and that "John Collier left a wife and a lot of orphan children, and in their behalf you should punish the defendant;" with reference to all of which statements the trial judge instructed the jury that they were not to be considered, as they rested upon no evidence in the case. *Held* that the instruction of the trial court was sufficient to countervail any prejudicial tendency of the said statements.
4. CHARGE OF THE COURT—MANSLAUGHTER—ADEQUATE CAUSE—SELF DEFENSE—"COOLING TIME."—Objection that the trial court charged the jury abstractly upon the issue of manslaughter can not be entertained, inasmuch as it was not interposed when the charge was given, and no probable injury to the accused is shown. See the opinion for a charge upon homicide in defense of the person against an unlawful attack, and the statement of the case for a charge upon adequate cause, *held* sufficient, under the facts of the case. And note that the evidence does not call for a charge upon "cooling time," nor upon self defense, wherefore the trial court did not err in omitting to charge upon "cooling time" nor refusing the special charge as to self defense.
5. MURDER—FACT CASE.—See the statement of the case for evidence *held* sufficient to support a conviction for murder of the second degree.

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Statement of the case.

APPEAL from the District Court of Dallas. Tried below before Hon. George N. Aldridge.

The conviction in this case was in the second degree for the murder of John Collier, in Dallas county, Texas, on the twenty-eighth day of October, 1886. The penalty assessed against the appellant was a term of five years in the penitentiary.

John Luck was the first witness for the State. He testified, in substance, that he was engaged in the mercantile business at Eagle Ford, Dallas county, Texas. He knew the defendant, and he knew John Collier, the deceased, in his lifetime. Witness could not state the exact date of John Collier's death, but it occurred in October, 1886. Collier, in his wood wagon, drove up to the front of the witness's store, in the afternoon of the fatal day, and called to witness to bring him five cents worth of candy for his child. Witness took the candy to him, and discovered that he was very drunk. He produced a bottle of whisky from which he and the witness, at his invitation, took a drink. Collier then attempted to get out of his wagon, but fell out across the doubletree. About that time the defendant, with Sam Rose and James Wright, each driving a wagon, arrived at the store, all of said parties, including Collier, having come from the direction of Dallas. About the time that the several wagons stopped, Collier remarked that his team "was the d—dest fastest team on the road." Defendant then said to Collier: "You are not the fastest man on the road." Collier replied to him: "Young man, I want nothing to do with you." Thereupon the defendant advanced upon Collier with his right hand on his hip and a little behind him. Collier backed from and fired upon the defendant as he advanced, missing him. Defendant then retreated, but continued to quarrel with Collier. The witness, who had gone into his store, came out, requested the parties to drop the matter, and to come into the store and take cigars with him. They presently agreed to do so, and took cigars. Collier then got into his wagon and drove off towards his home. Thirty minutes later the other parties followed, defendant riding the horse of Lon Barrett, who arrived about the close of the difficulty, and Barrett driving defendant's team.

Cross examined, the witness stated that he was at and in charge of his store on the fatal evening, and waited upon all customers. Defendant and Rose and Wright had not yet reached the store when the witness and Collier took a drink of

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whisky from Collier's bottle. Witness was in his store when Collier fired the shot at defendant, but he saw the shooting. Defendant was then in his shirt sleeves, and had no weapon on his person that the witness saw. The witness could not now say whether or not the defendant ran when Collier drew his pistol, but knew that the defendant did not run into the witness's store either then or after the shot was fired by Collier. Witness did not hear defendant tell Collier that he, defendant, was unarmed, and that he, Collier, might search him to verify that statement. The defendant lived about a mile and a half from Eagle Ford, beyond the river. Collier lived on the same road, about three and a half miles from Eagle Ford—about two miles beyond the defendant's house.

S. B. Rose was the next witness for the State. He testified, in substance, that he lived about a mile and a half north from Eagle Ford, within a very short distance of the house of the defendant, and between that house and Eagle Ford. Collier, defendant, James Wright and witness each took a wagon load of wood to Dallas on the fatal Saturday. Collier was the first of the parties to start home on that evening. Witness, defendant and James Wright, the one behind the other in the order named, left Dallas together, each driving his own wagon. At or near Cottonwood branch, which was about a mile east from Eagle Ford, they overtook and passed Collier, who was lying in his wagon, with his hat over his face, and very drunk. Having passed Collier a short distance, witness, defendant and Wright stopped their wagons, and defendant said that he would go back and "cut" Collier a few "licks" with his whip. Wright and Dan Curtis, who had joined the party, were present, and heard defendant threaten to go back and strike deceased with his whip. Witness, however, would not permit defendant to go back to Collier's wagon, but went himself, waked Collier, and told him to sit up to avoid falling and hurting himself. Witness in his wagon, defendant and Curtis in defendant's wagon, and Wright in his wagon, then drove on to Luck's store at Eagle Ford, in the order named, witness reaching the store in advance of his companions, and all of them getting there before Collier arrived. Witness went into Luck's store and purchased some candy for his children, Luck being present and waiting on him. After the other parties arrived, and while witness was in the store, Collier drove up, passed

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around the other wagons, and stopped his wagon in front of the others. The witness presently heard the report of a pistol, and, upon looking out of the store, saw Collier with one hand to his head, and smoke ascending from a pistol in the other hand. Witness did not see the pistol, but saw the smoke. Collier was retreating when he fired the shot. He put his pistol back into his pocket almost immediately after he discharged it. Luck was in his store waiting on the witness at the time Collier fired upon defendant, and witness was standing at the end of the counter nearer the front door than Luck then was. About that time Luck stepped to the door and called to the parties: "Drop that matter, and come in and take cigars with me." The several parties then came into the store and each took a cigar. About that time Lon Barrett came to the store on horseback.

A few minutes later Collier got into his wagon and drove slowly towards his home. Thirty minutes later the witness, in his wagon, defendant next, Wright next, and Barrett on horseback, following, left Luck's store and traveled rapidly over the same road in the wake of Collier. Before leaving Luck's store defendant repeatedly requested Barrett to drive his wagon and permit him to ride his, Barrett's horse, but Barrett refused. The parties reached the west fork of the Trinity river in the order named, Barrett still on horseback. Collier had then crossed the river and disappeared. On the south bank of the said west fork of the Trinity river the parties stopped. The defendant there laughed and cried alternately in a very excited manner, and again begged Barrett for his horse for the purpose of riding hurriedly home to get his pistol and intercept and kill Collier. Witness and the others strove to quiet defendant, and urged him to let the matter drop. After considerable talk they prevailed upon the defendant to agree to drop the matter. Defendant then said that he wanted no difficulty with Collier, and would drop the matter; whereupon the witness requested Barrett not to change his mind and lend his horse to defendant, and drove across the river without stopping to water his horses, and started rapidly to his home, about a mile distant. At a short distance from the river, it then being about dark, a man on horseback, and riding rapidly, passed the witness, going in the same direction that witness was traveling. The witness did not recognize either the horseman or horse. Just before reaching his house the witness heard a pis-

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tol shot, and when he got nearer his house he saw a man lying near the well, which was near the road, and between the road and witness's house. He went to that man and found him to be John Collier. While examining Collier a man rode up and asked witness: "Is Collier much hurt?" Witness replied: "Yes; he is killed." The man said: "That is all right," and rode off. It was then too dark to distinguish the man's features, but by his voice the witness recognized the defendant.

When found by the witness, Collier was lying with his feet at the well and his head pointing towards witness's house. Witness's wife presently arrived with a light, and witness seized Collier's body for the purpose of taking him into the house, but found that he could not move him alone. In trying to take Collier up, the witness pressed his thigh against Collier's pocket, and by that means felt Collier's pistol in his pocket. When he put Collier down he took the pistol out of his pocket and handed it to his own wife. Witness's wife then attempted to aid witness to take Collier to the house, but they were unable to move him. A few minutes later Mr. LeNott, on his way home in his wagon, appeared in the road, and witness called upon him for assistance, and with LeNott's aid he succeeded in getting Collier into the house. A doctor was then sent for, but did not reach the house for some time. This occurred on Saturday, October —, 1886. Collier died at the witness's house on the following Monday. He died from the effects of a gun shot which entered his stomach about two inches from the navel. All of the parties named by the witness, including himself, were drinking on the fatal Saturday, but Collier was the only one of the parties who was drunk.

Cross examined, the witness reasserted most positively that when he, with defendant, Wright and Barrett, left Luck's store on the fatal evening, the defendant was driving his own wagon, and Barrett was riding horseback, and that they continued to travel in that manner until they reached the south bank of the west fork of the Trinity river, which was about a mile from Luck's store. The witness left the said parties on the said bank, at which time defendant had not left his wagon and mounted Barrett's horse. Witness saw no more that night of any of the said party except defendant, whom, as stated, he recognized only by his voice. The witness was equally positive that Collier was the last of the party to reach Luck's store on their return from Dallas on the fatal evening. It was get-

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ting dark when the witness left the river for home. Collier, who was quite half an hour ahead of witness, had then had ample time to reach his home, which was but two and a half miles from the river. The defendant's house was situated about two hundred yards beyond the house of the witness, which was one mile from the river—all of the said houses being on the same road. The witness could not say how long it was after he left the river when the man on horseback passed him in the bottom, but at least ten minutes had elapsed. He could not say accurately how far he had gone when that man passed him, but he had reached a point not far from his house. It was too dark to recognize either the man or the horse when they passed, and, besides, the road was flanked on either side by dense timber. Witness saw no other person than the said horseman between his home and the river on that night. Witness's house stood about forty yards from and to the left of the road. The well mentioned by witness was about ten yards from the road and toward the river from the house. The house and well were in timber on the edge of a glade. Before reaching the well, on the fatal evening, the witness turned from the road, to the left, to go to his house. When he stopped near his house he heard the groaning of a man near the well. He went at once to the well and found John Collier, wounded, as before stated, lying on the ground. He did not then nor afterwards on that night see either Collier's wagon or team, nor Barrett's or any other horse. Witness did not, on that day, tell defendant where his, witness's, pistol was kept, or where it was on that night. Defendant had frequently visited witness's house, and knew as well as witness did, that he, witness, habitually kept his pistol under the head of his bed in his sleeping room.

The witness did not, when he reached Collier, a few minutes after the shooting, find Collier's pistol on the ground by Collier's side, and pick it up, and he denied that he ever, at his house on that night, or the next morning, or elsewhere at any other time, tell any person whomsoever that he found and picked up Collier's pistol from the ground, by Collier's side, as soon as he reached him. He denied that, at his, witness's, house on that night he told Mrs. Miller, the wife of defendant, that he found Collier's pistol on the ground and picked it up. He denied that, on the same occasion, he told Mrs. Miller that Collier ran on defendant at Luck's store that evening and defendant had to run from him, and that he ran on defendant

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again at his, witness's, house, and defendant had to shoot him. He denied that on the same or any other occasion he told Mrs. Miller that, after the shooting he, witness, gave defendant his, witness's, pistol. He denied that, on the next morning, at his, witness's, house, he got John Miller, the brother of defendant, away from the crowd there assembled, and told him that the defendant was not to blame for shooting Collier, but had to do it, and that he, witness, found Collier's pistol on the ground near where he lay. He denied that, after LeNott arrived, he called to his wife to bring a light, or that she then brought the light. He denied that he went to defendant's house on that night, and particularly did he deny that, going to that house on that night, he called to defendant, and in the presence of Lon Barrett told defendant that he, witness, had dropped Collier's pistol and wanted a light to find it, and that defendant gave him a light, and he searched for Collier's pistol. He denied that he took a package of cartridges to defendant's house on that night after the shooting, and gave them to the defendant in the presence of the said Barrett; nor did he at that time, nor at any other time, there nor elsewhere, in the presence of Barrett or any other person, tell defendant that he, defendant, might need his, witness's, pistol, and to keep it; nor did he ever tell any person that he ever, at any time, gave his said pistol to defendant. He denied that, in the court house in the city of Dallas, during the habeas corpus trial of this defendant, he told one Thomas Alford that he, witness, was present when Collier was shot; that he tried to hold Collier and keep him off of the defendant, but that Collier pulled loose from him and rushed upon defendant with his pistol in his hand, and defendant had to kill him to save his own life. He did not, at the same time and place, nor elsewhere at any other time, tell the said Alford that, after the shooting, he found and picked up Collier's pistol from the ground near where he fell; nor did he tell Alford that he gave defendant his, witness's pistol. The witness was not an infidel. He believed in religion—the religion of truth and science.

Mrs. Martha Rose, the wife of the preceding witness, testified, for the State, that on the fatal night the defendant rushed into her house and asked her for her husband's pistol. She told him that she did not know where it was. Defendant then sprang to the head of the bed, seized her husband's pistol and rushed out of the house. About ten minutes later the witness

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heard the report of a pistol, fired outside of the house. Her husband not being at home the witness became much frightened, and immediately after the pistol fired she blew out the light and sprang into bed. Her husband soon afterwards knocked at the door, but witness was too much frightened to recognize his voice, and she did not open the door until he called for a light the second time. She then got up, lit the lamp and went to where her husband was. He told her that Collier had been shot. She and her husband then went to Collier and attempted to move him into the house, but were unable to do so. Her husband then said that he felt Collier's pistol pressing against his thigh. He thereupon took the pistol from Collier's pocket and gave it to her. LeNott soon arrived and helped witness's husband remove Collier into the house. Witness took Collier's pistol into her house and put it on the mantel. Collier fell about seven steps from witness's house. On her cross examination this witness denied that she testified on the habeas corpus trial that defendant fired the pistol as he went out or immediately after he got out of the house. Witness heard no voice or voices at the time, nor just before the shot was fired.

The next witness for the State was Mrs. Jane Fleming. She testified that she was the sister-in-law of John Collier. She got to Rose's house on Sunday, the day after the shooting. She found Collier suffering from a gunshot wound in the stomach. He suffered more at intervals than at others. The bowels were much swollen and Collier was very sick—vomiting at intervals. He complained of fullness in the bowels. Witness took a seat by Collier's bed and said to him: "John, do you know that you are going to die?" He replied: "Aunt Jane, I am bound to die." He did not say that he was then dying, nor when he would die, nor how long he expected to live. Witness did not tell him that he was dying, nor did she hear any other person so tell him. Having stated to witness that he was bound to die, he said: "I was on my way from the well to the house to get a cup with which to get some water, when Mason Miller stepped out from the house and shot me. I told Miller not to shoot me."

P. C. Beard testified, for the State, that he was a deputy sheriff of Mason county, Texas, and in August, 1887, arrested the defendant in the said county. Defendant passed under the name of John Miller in Mason county. The distance from Dallas to Mason county was about three hundred miles.

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John Doyle, a resident of Mason county, also testified, for the State, that defendant, in Mason county, passed under the name of John Miller. He did not know that defendant's full name was George Mason Miller, and that his uncle, with whom he lived in Mason county, had a son named George Miller, and was in the habit of calling defendant "John" in order to distinguish him from George Miller

Sheriff Lewis, of Dallas county, testified that he searched for the defendant, after the shooting, throughout Dallas county, but failed to find him.

Lon Barrett testified, for the State, that he reached Luck's store on the fatal evening, after Collier had fired the shot at defendant, and had no personal knowledge of what transpired at the time. Collier left Luck's store soon after the witness reached it, and the other parties—Rose, defendant, Wright and witness—left it about thirty minutes later. When the parties last named started to leave the store, the defendant asked the witness to drive his team, and to lend him the horse he, witness, was riding. He said that he wanted to go to his house, get a pistol and kill Collier. The witness refused to lend his horse to the defendant for that purpose, but said to defendant: "We have had enough trouble; you had better let this matter drop." After considerable talking and urging, the defendant, who appeared to be very much excited, agreed to drop the quarrel and not molest Collier. The witness, who was going home with defendant to spend the night, then agreed to drive defendant's team and lend defendant his horse. The parties then left Luck's store, Rose in his wagon leading, witness driving defendant's wagon following, Wright following witness with his wagon, and the defendant riding witness's horse. In the order named the party traveled slowly to the west fork of the Trinity river. Throughout the journey to the bank of the river the defendant appeared to labor under great excitement, weeping and laughing alternately. The parties stopped on the river bank, and witness and Wright pleaded a considerable time with defendant to abandon his designs upon the life of Collier. Defendant became again excited, apparently by brooding over the occurrence at Luck's store, but was finally a second time prevailed upon to agree to drop the difficulty. Rose drove into and out of the river on the other side. Then Wright in his wagon, followed by the defendant on witness's horse, went into the river, leaving the witness with defendant's wagon and team on the south

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bank. Witness then drove into the river, watered the team and then drove out. When he mounted the bank on the other side neither Wright and his team nor defendant and witness's horse were in sight. Witness did not see Wright again on that night. He next saw defendant when he reached the vicinity of Rose's house. Defendant was then standing by the witness's horse, at the edge of a small glade immediately east of and near the well at Rose's house. Collier's team with the wagon was then standing in the main road some distance southeast from Rose's well. Defendant, riding witness's horse, and witness, driving defendant's team, went immediately to defendant's house. After reaching home the defendant unhitched his horses from his wagon, saddled one of them and left, going towards the house of Mrs. Girard, some miles distant, in the southwest portion of the county. Witness, riding his own horse, accompanied defendant as far as the house of Mr. Jim Horton, near Mrs. Girard's, where he passed the night.

Cross examined, the witness said that he did not, when he reached the vicinity of Rose's house, go to the well where Collier was lying, but went immediately home with defendant. Very soon after witness and the defendant reached the defendant's house, S. B. Rose came there. He said that he dropped Collier's pistol in front of defendant's house, and asked for a light with which to hunt for it. Defendant gave Rose a light and Rose went down the road towards his house, after which the witness did not see Rose on that night. While at the house Rose gave defendant a sack, which he told defendant contained cartridges, and which, he said, defendant might need to use in the defense of himself. The defendant owned a pistol, which he always kept at his house. Defendant's wife was not at home when witness and defendant got there, but was said to be visiting the house of her father, a short distance off. The witness's present statement was the first full statement of the facts in his knowledge made by witness, although, when he was before the grand jury, Mr. Clint directed him to tell all he knew about the occurrences on the fatal evening and night.

Henry Brittain testified, for the State, that John Collier was his half brother, and the wife of the defendant was his sister. The witness heard of the shooting of Collier on the night that it happened. He went at once to Rose's house, where Collier was, and remained there until about four o'clock on the next morn-

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ing. He found Collier shot in the stomach. His bowels were much swollen, and he told the witness that he was bleeding internally. It was the recollection of the witness that when, a few minutes after his arrival, a physician was sent for, Collier said that it was "of no use to send for a doctor." Witness asked Collier who shot him, and he replied: "Mason Miller." Witness then asked him how the shooting happened; what he was doing when shot; where he was, and when he first saw Miller. Collier said: "I was at the well, drinking, when I heard the click of a pistol. I turned and saw Miller at the corner of the house, and asked him not to shoot me, but he shot me."

The State closed.

James Wright was the first witness for the defense. He testified that he, with defendant, Rose and Collier went to the city of Dallas, each with a load of wood. Collier was the first to start home in the evening. Some time afterwards Rose, defendant and witness, traveling in company in the order named, left Dallas for home. At Cottonwood branch, about a mile from Luck's store, the said parties overtook and passed Collier. Collier, who was very drunk, was sitting in the bed of his wagon with his hat drawn down over his face, and had dropped his lines. Rose, defendant and witness stopped their teams after passing Collier, and about that time Dan Curtis joined them. Rose went back to Collier's wagon, waked him up and gave him his lines. It was not true, as testified by Rose, that then, or at any other time on that evening, defendant expressed a desire to go to Collier's wagon and strike Collier with his whip. Just before Luck's store was reached, Collier passed the wagons of the other parties and reached the said store first. He was on the ground, standing at the head of his team, when the other wagons drove up and stopped near the store. Defendant then came to witness's wagon and got a small national flag which had been given to witness in town and attached the flag to the bridle of one of witness's horses, slapped the horse's neck, and said: "Here is the fastest d—d horse on the road." Collier stepped forward and said: "I am the fastest d—d man on the road." Defendant replied: "John Collier, you are not the fastest man on the road." Collier replied: "Young man, I want no truck with you." Defendant said: "That's all right, but you are not the fastest man on this road." Collier then started towards defendant, and defendant, who was in his shirt

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sleeves, threw down his whip and gloves, pulled up his pants and started towards Collier, when Collier drew his pistol and fired at defendant. Defendant ran into Luck's store, but soon reappeared on the gallery and said to Collier: "I am unarmed and you know it. If you will lay down your pistol and fight me fair, I am ready for you." About this time Luck came out of the store with a box of cigars and said: "You all dry up; make friends and I will treat." Each of the parties took a cigar and Collier soon got into his wagon and left, and about this time Lon Barrett, on horseback, arrived at the store. Defendant then attempted to prevail upon Barrett to drive his wagon and lend him his, Barrett's, horse. Barrett at first refused but finally consented, and, about thirty minutes after Collier left, the other parties started, Rose in his wagon going in the lead, Barrett in defendant's wagon following Rose, witness in the wagon following Barrett, and defendant riding Barrett's horse. The said parties traveled in the order named as far as the south bank of the west fork of the Trinity river, which was about a mile distant from Luck's store. The defendant displayed great excitement and manifested and expressed a desire to go on home, get his pistol and kill Collier. The party stopped on the south bank of the river, and witness and Barrett urged defendant to abandon his design upon Collier's life. Defendant finally said that he wanted no trouble with Collier and would drop the matter. Rose then drove across the river. Witness and the defendant, the latter riding Barrett's horse, then went into the river, watered their horses and crossed, by which time Rose disappeared, and Barrett, in defendant's wagon, was still on the south bank. Witness then told defendant to ride on home and do up his chores, and that he, witness, would call at his house later, to go with him to the meeting of the Farmer's Alliance. Defendant agreed and rode off, and witness saw him no more on that night.

D. A. Williams testified, for the defense, that he was present at the habeas corpus trial of the defendant before the Hon. J. M. Hurt, judge of the Court of Appeals, and heard the testimony of Mrs. Martha Rose delivered on that occasion. Mrs. Rose stated, in the course of her evidence, that, having secured Rose's pistol, the defendant rushed out of the house and fired the pistol immediately—that she heard the report just as the defendant got out of the house.

R. B. Hickman testified, for the defense, that he saw Collier

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and the defendant in the city of Dallas early on the afternoon of the fatal Saturday. Passing Collier and some other parties near a saloon on the public square, he heard Collier say to such other parties that Mason Miller was a d—d scoundrel, and that he, Collier was going to kill him. Collier then followed the defendant, and defendant drew back to get out of Collier's way. Other parties who were then with Collier placed themselves between Collier and defendant to prevent a difficulty, and defendant walked off to the place where several wagons were standing, and witness saw him no more on that evening. After defendant left the crowd, Collier said: "God d—n him, I have got a six shooter that will get him." During the time covered by these occurrences, Collier exhibited a pistol and a knife to the witness. Soon after defendant went to the wagon, a man whom witness did not know, but who did not correspond with the description given the witness of James Wright, came hurriedly to the crowd around Collier. S. B. Rose was one of the parties with Collier when Collier threatened to kill defendant. This witness stated on cross examination that his principal business in life was drinking beer, but he sometimes hauled wood. The knife exhibited by Collier was a weapon about twelve inches in length. Witness had often, previous to the said Saturday, heard Collier threaten to kill defendant.

Thomas Alford was the next witness for the defense. He testified that he met Collier in Dallas on the fatal day, and about noon on that day took a drink with him in Tom Cade's saloon. On that occasion Collier told the witness that he was armed, and that he intended to kill Mason Miller. Witness then saw that Collier was armed with a pistol and a knife. He knew Collier well and considered him to be a dangerous man, and one who would most probably execute a threat. Witness, feeling a great interest in the case of the defendant, attended the habeas corpus trial, and during that proceeding, at the court house, in the city of Dallas, had a talk with the State's witness Rose, in the course of which talk Rose told him that he, Rose, was present, and saw the shooting of Collier by the defendant; that he tried to hold Collier and keep him off of the defendant, but that Collier pulled loose from him and rushed upon defendant with his pistol in his hand, and that defendant had to shoot Collier in self defense, and that after the shooting he found Collier's pistol on the ground by Collier's side, and picked it up before anybody else reached Collier. Rose, in the

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same conversation, told the witness that after the shooting he, Rose, gave defendant his, Rose's, pistol. This conversation occurred just before the habeas corpus trial commenced.

William Wright testified, for the defense, that on one occasion previous to the fatal Saturday, Collier told him that he, Collier, had had several "rackets" with the defendant, and that he, Collier, intended to cut the defendant's throat the very next time the defendant crossed his path. He had often heard Collier threaten to kill defendant. Witness considered Collier a violent, dangerous man, who would be likely to execute a threat.

Mrs. Lizzie Miller, the wife of the defendant, and the half sister of Collier, testified, for the defense, that she was at her father's house, a short distance from the house of her husband, at the time that Collier was shot. She heard of the shooting on that same night, and went to Rose's house, where Collier then was. When she reached the house, the State's witness, S. B. Rose, told her that Collier tried to shoot defendant at Luck's store on that evening, and that defendant had to run into Luck's store to save himself; that, when they reached his, Rose's, house on that night, Collier again ran upon defendant with his pistol, and that defendant had to shoot him in self defense; that he, Rose, afterwards picked up Collier's pistol from the ground by Collier's side, and that, after the shooting, he gave the defendant his, Rose's, pistol. Defendant had a pistol of his own at home. It was in the house when witness left, late that evening, to go to her father's house. Defendant always kept his pistol at home, and never carried it about his person.

Dock Ward testified, for the defense, that he met Collier in the road two or three days before the fatal Saturday. Collier was in his wagon, and had a pistol in his hand, which he was polishing. On that occasion he told witness that he would kill Mason Miller before the close of the week. Witness had often heard Collier, when drinking, threaten to kill the defendant. He considered Collier a violent, dangerous man, who would most likely execute a threat.

Doctor Stovall testified, for the defense, that he reached Rose's house about two o'clock on Sunday morning. He remained there about an hour, and returned again about nine o'clock. He examined Collier's wound, which he decided was necessarily fatal. He did not tell Collier that he would die, but

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told his relatives that it was useless for him, witness, to come back, as he could do Collier no good. Witness prescribed morphine to alleviate the wounded man's pain, but not enough to affect his understanding. He was afterwards informed that Collier's stomach failed to retain the morphine.

Mrs. Bettie Alley, the next witness for the defense, testified that she went to Rose's house to see Collier on Sunday evening, and remained there about two hours. During the time that she was there, Collier was under the influenc of morphine, and talked foolishly. He did not appear to know what he talked about.

Mrs. Sue O'Day testified, for the defense, that she met and talked with Collier in the city of Dallas on the Thursday before the shooting. On that occasion Collier told witness that he intended to kill Mason Miller. Witness said: "I reckon not." Collier replied: "Yes, I intend to kill the whole d—n Miller outfit." Witness said to him: "You will not kill his wife—your sister Lizzie?" Collier replied: "I don't know about her, but she is nothing but a God d—d black-eyed whore." Witness had often heard Collier threaten defendant, but never before heard him make such a remark about defendant's wife. She met defendant in Dallas on the morning of the fatal Saturday, and told him what Collier said to her on the previous Thursday.

On cross examination, this witness said that when she told defendant on Saturday what Collier said on Thursday about Mrs. Miller, and about killing "the whole God d—d Miller outfit," the defendant stood mute for a minute, and then walked off, remarking, interrogatively: "Will Collier do all that by himself?" Witness never heard defendant utter a threat against Collier.

John LeNott testified, for the defense, that he went to the city of Dallas on the fatal Saturday, and reached Rose's house, on his return, after dark. When he got about opposite Rose's house Rose called to him that Collier was lying there, shot. He went to the place between Rose's house and well, and found Collier lying on the ground. Rose then called to his wife to bring a light from the house. Mrs. Rose brought a lamp and witness and Rose carried Collier into the house. There was no pistol about Collier's person nor on the ground, nor did Rose, while witness was there, take a pistol from Collier's pocket, nor did he give a pistol to Mrs. Rose after she

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reached the place where Collier was, nor did Mrs. Rose take a pistol into the house.

John Lasater testified, for the defense, that he lived on the main road between Rose's house and the crossing of the west fork of the Trinity, and about a quarter of a mile from Rose's house. He owned a shot gun which he kept loaded at all times, and which was kept at his said house. He had often loaned that gun to defendant, and defendant knew perfectly well where it was kept and that he could get it at any and all times. The said gun was at the witness's house, loaded, on the fatal Saturday evening, and there was no reason why the defendant should or could not have taken it. It was generally known to the witness and to the neighbors at the time of the shooting that no bucket was kept at Rose's well, and that no person was permitted to water horses at that well. Collier was a violent, quarrelsome and dangerous character.

Mrs. Puss Girard testified, for the defense, that the defendant was her neighbor. Defendant came to her house on the night of the shooting, and remained until next morning, when he left. He returned a few days later and stated that he was going to the city of Dallas to surrender. Witness dissuaded him from that purpose, advising him against surrender at that time, upon the ground that the excitement and feeling against him was still too great to render surrender safe.

Mrs. Bowers and Miss Shuler Bowers testified, for the defense, that they were at Eagle Ford on the evening of the fatal day, when Collier shot at defendant. When that shot was fired defendant ran into Luck's store.

John Miller, the brother of defendant, testified, for the defense, that he went to Rose's house on the morning after the shooting. When he arrived Rose took him aside and told him that the defendant was not to blame for shooting Collier; that he had to do it, and that after the shooting he, Rose, found Collier's pistol on the ground near where he fell. The defendant, at the time of the shooting, had a pistol of his own at his home, which was within two hundred yards of Rose's house.

Dan Curtis testified, for the defense, that he overtook Rose, defendant and Wright, on the fatal Saturday evening near Cottonwood branch, between Dallas and Eagle Ford, to which place he went with them. They soon overtook and passed Collier, who appeared to be asleep in his wagon. They then stopped and Rose went back to Collier's wagon and waked him up.

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Defendant did not threaten at that time to go back and strike Collier with his whip. Collier soon passed the other wagons and reached Luck's store first, and was standing at the head of his team when the others arrived. A dispute then arose between defendant and Collier. Collier then drew a pistol and fired upon defendant, at which time Collier was retreating and defendant advancing.

Mr. Beck testified, for the defense, that he knew John Collier, and that he was a violent, dangerous man, who would most likely execute a threat

The defense closed.

Jack Beets testified, for the State, in rebuttal, that about a year before the killing of Collier he had a conversation with the defendant about certain threats uttered by Collier against defendant, in the course of which the defendant said to witness: "The threats of John Collier do not amount to any more than the threats of an old woman." Collier was a quarrelsome man when drinking, but was neither a dangerous man nor a man likely to carry out a violent threat.

Louisa Langley testified, for the State, that, several months before the shooting of Collier, the defendant came into the field where the witness and a daughter of Collier were at work, and in the course of a wordy altercation that ensued said that he intended to kill Collier. The reputation of Mrs. Miller, the wife of defendant, for chastity, was very bad in the neighborhood in which she resided. Witness had heard that reputation pronounced bad by a large number of people, the names of whom, nor of any of whom, was she able to give. Four or five other witnesses for the State testified as did the witness Louisa Langley as to Mrs. Miller's reputation for chastity. Three of the same witnesses declared that Collier was not a dangerous man.

The State closing finally, the defense introduced half a dozen witnesses who testified that Mrs. Miller's reputation for chastity in Dallas county, where she had always lived, was good and had always been good.

The charge of the court on adequate cause, referred to in the fourth head note of this report reads: "By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. Insulting words or gestures, or an assault and bat-

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tery so slight as to show no intention to inflict pain or injury, are not 'adequate causes.'"

"The following are deemed adequate causes:

"1. An assault and battery by deceased, causing pain and bloodshed.

"2. A serious personal conflict, in which great injury is inflicted by the person killed by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made for the purpose of killing.

"3. Insulting words or conduct toward the wife of the party guilty of the homicide."

Coombes & Gano filed an able brief and argument for the appellant.

W. L. Davidson, Assistant Attorney General, for the State

HURT, JUDGE. At the Austin term the judgment in this case was affirmed without a written opinion. Counsel for appellant presents this motion for rehearing, insisting earnestly that the record contains errors for which the judgment should be reversed, and we will now notice the errors assigned. The appellant was convicted of murder in the second degree for killing John Collier.

The first error assigned is that "the court erred in admitting the statement made by Collier after he was shot, because the proper predicate had not been laid." The statement under this proposition is that Collier was shot after dark on the evening of October 28, 1886, and was carried into the house of S. B. Rose. On the next day after he was shot, his sister-in-law, Mrs. Fleming, saw and conversed with him. To her he made a statement under these circumstances: He was shot in the bowels. On Sunday he suffered intensely — at times more than others. His bowels were swollen, and he was very sick — vomiting at intervals. He complained of fullness in the bowels, and said that he was bleeding internally. Mrs. Fleming took a seat by the bed and said to him: "John, do you know that you are going to die?" He did not say that he was dying, or that he expected to die, but replied to Mrs. Fleming: "Aunt, I am bound to die!" The counsel for appellant con-

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tended that the declarations were not made under a sense of impending death; that it does not appear that deceased was impressed wiih the belief of almost immediate dissolution; that the reply to Mrs. Fleming: "I am bound to die," may be true, yet this fails to show that the declarant believed he was in danger of almost immediate dissolution.

To infer, under the facts attending deceased when this statement was made, that he simply meant that at some time he was bound to die, would be unnatural and unreasonable. Thus to presume would be to place the deceased in the attitude of a jester whilst in the most awful condition in which a man can be placed. The declarations must be made under a sense of impending death, but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any manner that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of medical or other attendants stated to him, or from his conduct or other circumstances of the case—all of which are resorted to in order to ascertain the state of the declarant's mind. (1 Greenlf. Ev., 192.) Looking, therefore, to all the facts surrounding the deceased when the declarations were made, we are of opinion that they were made under a sense of impending death, and, so far as this objection is concerned, were competent evidence. The same observations apply to the question of the sanity of the deceased.

The appellant introduced evidence of threats by deceased shortly before the homicide. The State, over objection, proved by Beets that appellant, about a year before the homicide, stated to the witness (Beets) that the threats of John Collier did not amount to more than those of an old woman. Under the above state of case, this was most evidently competent evidence.

A number of bills of exception were reserved by appellant to remarks and statements made in argument by counsel for the prosecution. In every instance, however, the court acted in such manner as to render the remarks and statements harmless.

There was no error in the charge of the court in regard to adequate causes. Appellant complains that the court gave to the jury abstract law upon the subject of manslaughter. Ap-

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pellant did not object at the time to these charges; hence, to reverse for this, some injury must appear or be probable—which does not appear in this case.

Appellant objected on the trial to this charge: "Homicide is justifiable also in the protection of the person against any other unlawful and violent attack besides those mentioned, * * * and in such cases all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." This charge is in the language of the statute and is correct. Appellant requested the following charge, which was refused, and he excepted: "You are instructed that if the homicide was committed in protection of the person against an attack which produced a reasonable expectation or fear of death, or some serious bodily injury, then it would not be necessary for the party so attacked to resort to any other means before killing his assailant." Counsel cite us to no statement—no fact in the record—presenting the question of self defense; and if there be such evidence in this record we have failed to discover it. Rose swears to no fact raising the question, and if he stated such facts to others they could only be used to impeach him. This being so, whether the instruction was abstractly correct or not, the court acted properly in refusing to give it in charge to the jury.

The objections urged to the charge of the court relating to accomplice testimony were not made at the time, nor does it appear that the appellant was probably injured in this matter. Under the facts of this case, there was no necessity for the court to instruct the jury on "cooling time."

It is seriously contended that the verdict of the jury is not supported by the evidence. We think differently. The facts in this record establish, to the mind of the writer, a cold-blooded, deliberate assassination, and the appellant should rejoice that he escaped capital punishment.

We have very carefully considered all the grounds (though we have not written upon them all) relied upon for a reversal of the judgment, but we think none of them are well taken, and the motion for rehearing must be denied.

Rehearing refused.

Opinion delivered January 19, 1889.

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Statement of the case.

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No. 2530.

JOHN PEACE v. THE STATE.

1. PRACTICE—CONTINUANCE—NEW TRIAL.—Even if the absent testimony set out in an application for continuance be both admissible and probably true, it will not, if immaterial, require the award of a new trial because of the refusal of the continuance.
2. SAME—CHARGE OF THE COURT—BILL OF EXCEPTION reserved to the charge of the court, if too general or indefinite to point out specific objection, will not be considered on appeal; and, in the absence of a proper bill of exception, this court will examine the charge of the court below only with reference to fundamental errors or such as, under all the circumstances of the case, are calculated to prejudice the rights of the accused.
3. MURDER—FACT CASE.—See the statement of the case for evidence *held* sufficient to support a conviction for murder of the first degree.

APPEAL from the District Court of DeWitt. Tried below before the Hon. H. C. Pleasants.

This conviction was in the first degree for the murder of W. B. Stonebraker, in DeWitt county, Texas, on the fifteenth day of August, 1887. A life term in the penitentiary was the penalty assessed against the appellant.

W. L. Rudd, sheriff of Karnes county, Texas, was the first witness for the State. He testified that he lived in the town of Helena, Karnes county, in August, 1887. About eleven o'clock on the night of Monday, August 15, 1887, the witness was awakened by the shouting of some person at his gate. On going to the gate he found the person to be Milam Odom. Odom was slightly wounded, and was taken by the witness into his, witness's, house. Witness then went to Butler's hotel where John Rutledge lived, and informed Rutledge that Odom, wounded, had arrived from his, Rutledge's, ranch, which was situated in DeWitt county about eight miles from Helena, and reported that somebody on that ranch had been killed. Rutledge then went to get a physician to attend to Odom, and witness summoned a posse and repaired to Rutledge's ranch. Upon his arrival at the ranch he found the dead body of Stonebraker, but there was no living person on the place. The house at Rut-

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ledge's ranch was a building of two rooms with a gallery in front. The house fronted south, the rooms standing one behind the other, the small or rear room being a shed room. A door pierced the north side of the shed room, another opened between the two rooms, and a third led from the first room to the gallery. The three doors were on a direct line with each other. The north string of the fence was about twelve feet distant from the house. A light was burning dimly on a table in the southeast corner of the north room when the witness reached the ranch. The body of Stonebraker lay back down, in the north room, his feet near the door between the two rooms and his head pointing towards the northwest corner of the room.

Witness examined the body and found that the left side and front had been pierced by five buck shot. Further describing his discoveries about the house, the witness said: "I also found three shot in the wall just to the right of the door from the front room to the gallery. One of these shots went through the wall; and there were two shots in the front fence, some thirty or forty feet from the house. On the other side of the house, near the north door, there was the remains of a fire in the back yard."

The witness knew the defendant as John Peace. He was delivered to the custody of the witness on Tuesday, the day after the killing, by Lieutenant Grimes of the State ranger service, and witness placed him in the Cuero jail. The last time that witness saw the defendant prior to the killing of Stonebraker was on the Friday preceding the tragedy. He came on that evening to Harper's ranch, where the witness and W. T. Morris and their wives then were. He said that he was on his way to Houston's ranch. Soon after he reached Harper's ranch, Sam Harper got home from Yorktown. In the course of the general conversation which ensued, somebody remarked to defendant interrogatively: "John, do you know that Stonebraker has taken your feather bed?" Defendant replied: "Well, d—n him, if he has, I will kill him. Don't you think I ought to, Rudd?" Witness said, in reply: "No; you ought to do nothing of the kind." A few days after the killing of Stonebraker the witness went to Butler's hotel to look for a pistol. While looking about the gallery Mrs. Butler asked him what he was looking for. He told her, and she directed him to a place on the gallery near a flower stand, where he found the pistol.

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Statement of the case.

Witness kept that pistol until it was claimed by Milam Odom, when he delivered it to him. On his cross examination, the witness said that he did not regard as serious the threat against Stonebraker uttered by the defendant at Harper's ranch.

W. T. Morris and Sam Harper, testifying for the State, corroborated the witness Rudd as to the threats uttered by the defendant at Harper's ranch. Morris further testified that, ten days or two weeks prior to the death of Stonebraker, he was on a scout with Rudd, defendant and others. Witness was armed with a double barreled shot gun that belonged to Rudd. Examining the gun while in the witness's hands, the defendant remarked that he "believed he would borrow that gun from Rudd." Witness asked him if he wanted it to hunt with. He replied: "No; I want it to kill Stonebraker with." The witness, at that time, did not think the defendant made the statement seriously.

D. G. Butler testified, for the State, that he was the proprietor of Butler's hotel, in Helena, Karnes county, Texas. Information about the killing of Stonebraker was brought to the witness's hotel about eleven o'clock on the fatal night. John Rutledge, who boarded at witness's hotel, was then sleeping on the gallery. Upon being informed of the killing of Stonebraker and the wounding of Odom, Rutledge went first to see about having Odom attended to, and then went to his ranch with Rudd. Some time after Rutledge left,—between one and two o'clock,—the defendant came to witness's house. When he stepped on the gallery, the witness looked out of his room to see who he was. Mistaking him for Odom, the witness asked him: "Milam, does your wound hurt you much?" Defendant replied: "This is not Milam," and witness recognized him, and told him that Stonebraker had been killed at Rutledge's ranch, and Odom wounded. He replied that he had been down the country on business for Rutledge, and had not heard of the killing. Witness returned to his room and retired, and defendant lay down in the bed that Rutledge had recently left. Defendant was still in Rutledge's bed on the gallery when witness got up next morning, but left soon afterwards. A horse was tied at the fence when witness got up in the morning, but when he missed the defendant a few minutes later, he observed that the horse was also gone. He next saw the defendant between ten and eleven o'clock on that morning. He was unable to say

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whether or not defendant got breakfast at his hotel on that morning.

Milam Odom was the next witness for the State. He testified that he was at Rutledge's ranch at the time Stonebraker was killed. He and the defendant lived at the same ranch, being employes of Rutledge. The witness and Rutledge, in a buggy, left the ranch on the Saturday evening preceding the fatal Monday. They left the doors unlocked. They left Yorktown on Monday evening, passed Stonebraker with two hands, Schneider and Polschinzski, driving a herd of cattle, towards the ranch, and reached the ranch about dark. Rutledge changed horses at the ranch, and in his buggy started on to Helena. Witness got a horse and went back to meet Stonebraker and help him with the cattle, which Rutledge was to pasture for him. It was between eight and nine o'clock when Stonebraker, witness and the two hands reached the ranch and penned the cattle. A fire was immediately built near the back door of the north room, and witness prepared to cook supper. He got a basin of water and placed it on the gallery immediately in front of the door, and proceeded to bathe his face and hands. Stonebraker was then in the shed room. While witness was washing, a shot was fired from behind the house. Witness ran to the front fence, jumped over it, and fled to the point where his horse was hitched, about two hundred yards distant. Witness waited at that point a few minutes, when he ventured to approach as near the house as the tree where his saddle was hanging. From that point he looked into the shed room, in which there was a light burning, and saw the body of a man lying on the floor. He then saddled his horse and rode to Helena. One of the shots fired from the gun at the time of the killing struck the witness in the thigh, inflicting a slight wound.

When the witness and Rutledge left the ranch on Saturday evening, Rutledge's double barreled breech loading shot gun was standing in a corner of the front room. The witness and defendant had used that gun on two or three occasions to kill birds, withdrawing the loads of buckshot and substituting bird shot. Witness could not now remember where he placed the buckshot removed from the gun but thought it probable that he put them either in his trunk or in a box on the mantel in the front room. The gun was loaded with bird shot when witness and Rutledge left the ranch on Saturday. The gun was

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not at the ranch when witness looked for it on the morning after the killing. Witness and defendant, who were second cousins, had been living at the ranch about six months at the time of the killing. The witness and Rutledge helped Stonebraker, on the morning of the fatal Monday, gather Stonebraker's cattle in a pasture at Yorktown. While witness and Rutledge were holding some of the cattle at a pen on that morning, defendant came by. Stonebraker was not then at the pen. Defendant knew Stonebraker's brand, and if he asked witness what he was going to do with the cattle—and witness did not remember that he did—witness told him. Witness was unable to say that defendant knew that Stonebraker was going to take the cattle to Rutledge's ranch. Defendant left Rutledge's ranch on a mission for Rutledge on Friday, to go to Houston's ranch, fifteen or twenty miles from Yorktown. He did not get to Yorktown until Saturday. Witness saw him in Yorktown on Saturday and Sunday, and as late as noon on Monday. He left Yorktown about noon, saying that he was going to Allee's ranch, in Goliad county, eighteen miles south from Yorktown, to take a note to Allee from Rutledge. He was then riding a bay horse. The horse he was riding when arrested in Helena, on the day after the killing, was a gray horse that belonged to Rutledge, and that was kept on the ranch. That horse was supposed to be on the ranch when witness and Rutledge left it on Saturday. Witness did not see defendant after he left Yorktown to go to Allee's until after his arrest next day. Witness could not accurately fix the hour at which he and Rutledge left Yorktown on Monday evening, but they drove rapidly in a two horse buggy, and reached the ranch soon after sun set, traversing a distance of twelve miles. In Yorktown, on the Saturday before the killing, the defendant asked the witness for his pistol. Witness told him that it was in his saddle pockets at the house of Mrs. Friar in Yorktown. Defendant said he wanted the pistol to take with him down the country. Witness, some time after the killing, found his pistol in the possession of Sheriff Rudd, claimed and got it.

Cross examined, the witness said that he did not lock the doors of the ranch house when he left it on Saturday. He had often before left the doors unlocked, and frequently missed articles which disappeared from the house during his absence. Whether probable or not, it was quite possible that the shot

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gun was stolen from the said house by somebody. The gray horse that defendant was riding when arrested was a very gentle animal. Witness had never caught that horse outside of a pen, but was confident that, with little difficulty, he could be caught when running loose in the pasture. Allee's ranch was about eighteen miles south from Yorktown. It was about the same distance from Rutledge's ranch, which was about twelve miles west from Yorktown. The bay horse that defendant had in Yorktown appeared to be jaded. The witness and defendant frequently accompanied Sheriff Rudd in scouts throughout the country in quest of Will Jacobs and Rheinhardt Schneider, two notorious outlaws. Defendant was afraid to stay at Rutledge's ranch alone. He often went to Yorktown with the witness. They were often in Yorktown at night. Stonebraker was town marshal of Yorktown, and was often on the streets of Yorktown alone at night.

John Rutledge was the next witness for the State. He testified that he and Odom went to Yorktown from his, witness's ranch on the Saturday previous to the fatal Monday, and remained there until Monday evening, when they returned to the ranch, passing Stonebraker with a herd of cattle, and arriving at the ranch after sundown. This witness corroborated Odom as to the distances between the various points named by him, and stated that, in Yorktown, on Monday, he gave defendant a note which he directed him to take to Allee's ranch, and deliver to Allee. Defendant left Yorktown to go to Allee's ranch about noon. When witness and Odom reached witness's ranch, after sundown, on Monday evening, witness changed horses and started on to Helena; sending Odom back to meet Stonebraker and help him with his cattle. The witness's buggy broke down within a mile of his ranch, and witness, anxious to get to Helena that night, released one of the horses, and led the other to the house of a neighbor, where he borrowed a saddle, and went to Helena on horseback. While he was yet in the neighborhood of his ranch on that night, the witness heard no gun shots. About eleven o'clock on that night Odom reached Helena and reported the killing of Stonebraker. Witness went back to the ranch with Rudd on that night, and returned to Helena between eight and nine o'clock. On the next morning the defendant came to the witness in his room in the Butler Hotel, and gave him the note he started to take to Allee, remarking that he did not go to Allee's ranch because he learned

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that Allee was not at home. The witness took the note and defendant left, the witness, who was very tired, asking no questions. Defendant was arrested about eleven o'clock on that day. He was then riding a horse that belonged to the witness's ranch, but was not the horse that he had in Yorktown on Monday—the day of the killing. The witness knew that the defendant did not like Stonebraker, but he often saw the two together in Yorktown. A double barreled, number ten breech loading shot gun was kept at the ranch. It was there when witness and Odom left on Saturday, but had disappeared when witness got to the ranch on Monday night, after the killing. Witness had not seen the gun since the Saturday prior to the killing. The defendant was afraid to and would not stay long at the ranch at night, alone. Defendant passed the pen in Yorktown where witness and Odom, on Monday morning, were holding some of Stonebraker's cattle, but he asked no questions about them that witness heard, and witness said nothing to him about them. It is about a mile and a half to the witness's ranch from the corner of Short's fence on the Yorktown and Helena road. A trail runs from the said corner of Short's fence to the witness's ranch. Mrs. Butler's place on the road was about three miles from witness's ranch. Deceased, defendant and Odom were about the same in size; defendant being, perhaps, a shade smaller than either of the other two mentioned.

Nathaniel Thomas testified, for the State, that he lived on Mrs. Butler's place on the Yorktown and Helena road. One evening about the time of the killing of Stonebraker, but whether on the evening of that day or of a day previous or subsequent thereto witness was now unable to say, he saw a man traveling the road towards Helena whom he took to be and believed was the defendant, although he was not willing to swear to that fact. That man asked witness if he had recently seen a herd of cattle pass over the road. Witness told him that a herd of cattle passed a short time before, and the man rode on. Witness was herding sheep on the said evening when he saw and spoke to that man. That man was riding a bay horse.

Mark Moore was the next witness for the State. He testified that he lived on the main road between Helena and Yorktown, and about two miles from Rutledge's ranch. Witness and his son Harvey, traveling in a two-horse wagon, went to Yorktown on the fatal Monday, where, at about eleven o'clock a. m., the

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witness saw the defendant. He saw the defendant again on the evening of that day. Witness and his son were then on their way home from Yorktown, and the defendant, on horseback, was traveling the main road behind them, going towards Helena. He at no time approached the wagon nearer than seventy-five yards. When the defendant reached the corner of Short's fence, about a mile and a half distant from Rutledge's ranch, he left the road and went towards the said ranch, but did not take the trail. Defendant was then riding a bay, pacing horse. It was about an hour or an hour and a half before sun set when defendant left the road at the corner of Short's fence. Harvey Moore corroborated the testimony of this witness.

Max Polschinzski testified, for the State, that he was at Rutledge's ranch at the time of the killing of Stonebraker. He and William Schneider helped Stonebraker to drive a herd of cattle from Yorktown to that ranch on that day. They reached the ranch with the cattle after dark. Odom met them near the ranch, and helped them pen the cattle. Odom then said he would prepare supper, and a fire was built near the back door of the north room, and between the house and the fence. Witness and Schneider then sat down near the fence, and nearly but not quite opposite the door, and began to eat some dried beef they found on the fence. Stonebraker came to the door and asked witness and Schneider: "Boys, what are you eating?" Witness told him, and he replied: "If you don't look out, you eat some bugs." At that instant a shot was fired, the witness thought from the front of the house, and Stonebraker fell, exclaiming: "O, God! I am killed!" Witness and Schneider, thinking it a joke to frighten them, sat still for a minute or two, and then got up, and on hearing Stonebraker groan, and discovering blood on the floor, they fled, going as far as Gaibler's ranch, ten miles away, before stopping. William Schneider corroborated the testimony of Polschinzski.

S. Thomas testified, for the State, that he lived near Mrs. Butler's place, on the Yorktown and Helena road, and was the father of the witness Nathaniel Thomas. His said son was herding sheep near the said road on the Monday of the killing. When he came home that night, Nathaniel told his mother, in witness's hearing, that he saw the defendant on the road that evening. After the arrest of the defendant, on the next day, the witness went to where his son was herding sheep, and asked him again about seeing defendant on the previous evening,

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and cautioned him to say nothing about it unless he was certain about the identity of the man he saw. Nathaniel replied: "I am not certain, but I think it was Peace."

Alonzo Allee testified, for the State, that he was either at his ranch or in the immediate neighborhood on the fatal Monday, and was certainly at his ranch on the said Monday night. The defendant did not come to his house on that day or night.

F. R. Graves, county attorney of Karnes county, testified, for the State, that he went to Rutledge's ranch on the morning after the killing of Stonebraker. He found four buckshot holes in Stonebraker's body. Two of the shot which passed through the body were found in the clothing. They corresponded in size and appearance with the single buckshot which witness found in a box on a shelf in the room. This witness described the Rutledge ranch place as did Rudd, and stated that there was a large tree north of the house, about ten steps from the fence, and that between thirty and forty steps from the fence there was a pen and part of an old crib. The corner of the pen and the said tree were about on a line with the north door of the house.

Emil Schultz testified, for the State, that he lived in Helena, Karnes county. He attended a party at Yorktown on the night of April 19, 1887, and on the next day went home, accompanied by defendant as far as Short's corner, where the trail to Rutledge's ranch left the road. On the road the defendant said to witness, in the course of a conversation about Stonebraker: "Did you see the son of a bitch singing and dancing last night? He ought to be killed, and, God d—n him, I am going to kill him the first chance I get." The witness regarded the threat as a serious one, seriously made, but never communicated it to Stonebraker, as he never afterwards saw Stonebraker.

John Green testified, for the State, that about two weeks before the killing of Stonebraker, the defendant met witness on the streets of Yorktown and asked him: "Don't Stonebraker board at your house?" Witness replied that he did, and defendant said: "He is a son of a bitch, and I intend to kill him." Witness did not know whether defendant was talking seriously or not. He did not communicate that threat to Stonebraker.

William Metz testified, for the State, that he was present at and heard a conversation between defendant and John Rutledge, in Yorktown, on the Saturday before the killing of

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Stonebraker. While defendant and Rutledge were standing in front of Meyers's saloon, Stonebraker drove by in a buggy. Defendant asked Rutledge: "Who paid for that buggy?" Rutledge replied: "I did." Defendant then asked: "Who paid for the piano?" Rutledge replied: "I think I did." Defendant said: "And now he has taken my feather bed. He has gone as far as he can without killing." The witness thought that defendant uttered that threat seriously, but he did not communicate it to Stonebraker.

Fred Zedler testified, for the State, that he was a clerk in a mercantile house in Yorktown. Defendant came into the store on the day before the killing and began to talk about Stonebraker. He accused Stonebraker of taking a buggy from the estate of his, defendant's, deceased sister, and said something about a piano in the same connection. He concluded by saying: "And now he has stolen my feather bed." Witness asked him: "Johnny, what is the use of making all this trouble, when a few words of common sense will settle the matter between you and Stonebraker?" Defendant replied: "No; I won't speak to him; I am here to prosecute him for stealing my bed."

William Theisen testified, for the State, that defendant came to his blacksmith shop in Yorktown on the Saturday preceding the fatal Monday, and asked him: "Didn't I get you to make the buggy that Stonebraker has, for my sister?" Witness replied: "No; Mrs. Terry ordered it herself." He then asked witness: "Who paid for it?" and witness replied: "John Rutledge." Defendant then asked witness: "Why did you help Stonebraker take the piano that belonged to Mrs. Terry's children?" Witness replied: "I did not do so. Stonebraker wanted me to send for it, but I declined, as I thought trouble might come of it." Defendant then said to witness: "You were told, and you knew, that the piano did not belong to Stonebraker. But he got it and the buggy, too. Now he has taken my bed. I think his pot is about full, and it is likely to run over."

The State closed, and the defense introduced no evidence.

The application for continuance set out that by one of the absent witnesses the defendant would prove that, a day or two before the killing of Stonebraker, two men, whom the witness did not know, came to Rutledge's ranch and asked if defendant and Odom were there; that the witness replied in the negative,

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when the two men looked through the house and rode off. By another witness the defendant expected to prove that he, the said witness, saw the outlaws, Jacobs and Schneider, in Rutledge's pasture a day or two before the killing of Stonebraker. This proof was claimed to be material in view of the proof on the trial, that defendant had often, as one of the sheriff's posse, searched the country for the purpose of arresting Jacobs and Schneider.

No brief for the appellant on file.

W. L. Davidson, Assistant Attorney General, and *Fly & Davidson*, for the State.

WHITE, PRESIDING JUDGE. Appellant was indicted and tried in the lower court for the murder of one Stonebraker, and was found guilty of murder of the first degree, with his punishment affixed by the verdict and judgment at imprisonment for life in the penitentiary. No appearance has been entered nor brief filed for him by counsel on this appeal; notwithstanding which, however, we have most carefully considered the entire record to ascertain if any error had been committed in the conduct of the trial in the lower court.

Defendant made a motion for continuance, which was overruled and an exception duly reserved to the ruling. In the light of the other testimony which was adduced we do not believe that the proposed absent testimony, even if we should consider that it was admissible and probably true, would have been of any materiality in affecting the result of the trial.

The only other bill of exception was reserved to the charge of the court. It points out no particular error. A general rule well established is that "a bill of exception taken generally to the charge of the court, specifying no particular error or errors, has no standing and will not be considered by this court. In the absence of a proper bill of exceptions this court will examine the charge of the trial court only with regard to fundamental errors, or such as under all the circumstances of the case were calculated to injure the rights of the accused." (Smith v. The State, 22 Texas Ct. App., 316; Williams v. The State, Id., 497; Cordway v. The State, 25 Texas Ct. App., 405.) We find no such error in the charge of the court as would authorize a reversal of the judgment.

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Opinion of the court.

It only remains to consider the sufficiency of the evidence to support the verdict and judgment. Without recapitulating the facts, which will be reported, suffice it to say that the testimony, though circumstantial, establishes sufficiently motive, threats, preparation and proximity to the scene of the homicide on the part of this appellant, besides other circumstances of inculpatory character. The verdict and judgment are supported sufficiently by the evidence, and we would not be warranted in interfering with them. The judgment is affirmed.

Affirmed.

Opinion delivered January 19, 1889.

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No. 2650.

JAMES ALEXANDER *v.* THE STATE.

FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY—INDICTMENT to charge the fraudulent sale or disposition of mortgaged property must allege the name of the person to whom the same was sold or disposed of, or, if such be the fact, that the name of such person was to the grand jurors unknown.

APPEAL from the District Court of Travis. Tried below before the Hon. W. M. Key.

This conviction was for the fraudulent disposition of mortgaged property, and the penalty assessed against the appellant was a term of two years in the penitentiary.

No brief on file for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for the fraudulent sale and disposition of mortgaged property. It is not alleged in the indictment to whom the defendant sold or disposed of the property, or that such person was unknown to the grand jury. It is essential that the name of the person to whom the property was sold or disposed of should be alleged, or that it be

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Syllabus.

alleged that the name of such person was unknown to the grand jury; and the omission of such an allegation is a substantial and fatal defect in the indictment. (Presley v. The State, 24 Texas Ct. App., 494; ——— v. State, 26 Texas Ct. App., .)

Because the indictment is insufficient the judgment is reversed and the prosecution is dismissed.

Reversed and dismissed.

Opinion delivered January 23, 1889.

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No. 2545.

JERRY DUGGER v. THE STATE.

1. ACCOMPLICE TO MURDER—INDICTMENT.—The second count of the indictment (being the count upon which this conviction was had) charges that certain persons, to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder one Ellick Brown, and that defendant, prior to the commission of said murder by said unknown persons, did unlawfully, wilfully and of his malice aforethought, advise, command and encourage said unknown persons to commit said murder, said defendant not being present at the commission of said murder by said unknown persons. It was objected to the indictment that it neither named nor gave a description of the unknown persons who committed the murder of Brown. *Held*, that the objection is not sound, and the indictment is sufficient, its purpose and effect not being to charge the unknown persons as the "accused" in this case, but to charge the defendant as an accomplice to the murder of Brown.
2. SAME.—THE CHARGE OF THE COURT in this case should, more explicitly than it did, have instructed the jury that, to convict, they must find that the defendant was not present at the commission of the murder, and that the murder was committed by a person or persons who had been advised, commanded or encouraged by the defendant to commit it.
3. SAME—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction as an accomplice to murder.

APPEAL from the District Court of Lampasas. Tried below before the Hon. W. A. Blackburn.

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Statement of the case.

Under the second count in the indictment, the appellant in this case was convicted as an accomplice to murder in the first degree. A life term in the penitentiary was the penalty assessed by the verdict.

Hugh Brown was the first witness for the State. He testified that the deceased, Ellick Brown, was his brother. The said Ellick lived in Lampasas county, Texas, about one mile east from the residence of the witness. He was a bachelor, and lived alone. About noon on the first day of January, 1887, the defendant came to the witness's house and told him that his brother Ellick was dead; that he had just found his dead body in his house. The witness and defendant went at once to Ellick's house. On the way the defendant said that he went to the gate of Ellick's yard and hallooed three times for him, and, receiving no answer, he went to the door, which was closed, pushed it open and saw Ellick's body, covered, except the feet and legs, and lying on a pallett on the floor, the feet being tied with a rope. The witness and defendant did not go into the house on reaching Ellick's place. The tracks on the ground leading from the gate to the door and returning were the tracks which the defendant said he made on that morning. The yard gate was thirty or forty feet north from the house. Blood was found on the crib and on the ground under the crib. It had the appearance of being fresh blood. The witness and defendant did not go into the house, nor did they touch the body until the coroner's jury arrived. A crowd soon collected, and defendant remained the balance of the day with the witness, about the premises where the body was. The crib where the witness found the blood was about thirty yards distant from the house. Witness saw only the tracks which the defendant claimed to be his, but did not examine the whole of the yard. Three days had then elapsed since the witness was at Ellick's house, but he saw Ellick on the day before the night of his death. Two trails led to the gallery from the bloody places at the crib, and witness saw footsteps at the said bloody places.

J. L. Harvey testified, for the State, that he lived in Lampasas county, about three miles distant from the house in which Ellick Brown lived. He saw the body of Ellick Brown at the said house on the first day of January, 1887. He reached the body about three o'clock in the evening, and served as one of the coroner's jury. The defendant was one of the large number of persons present at Brown's house when the witness

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arrived. The body of Brown lay on a pallet on the floor, in front of the fire place. The body, except the feet, was covered with a quilt, and there was a piece of quilt around the neck and over the mouth. The feet were tied together and drawn up to meet the hands, which were also tied together, a piece of rope being used for that purpose. The skull was broken in, evidently by the blow of a blunt instrument. The throat and neck were bruised, the bruises on the throat resembling finger prints, and indicating choking with hands. Bruises on the breast and side appeared to have been made by boot heels. The skin was rubbed off the back, and indicated that the body had been dragged some distance. A trail leading from the gallery of the house to the crib, about twenty-five yards distant, was found. Blood was found on some logs of the house, and on the ground under the projecting ends of some logs. The indication at that point was that something had been recently hanged there. The trail mentioned by the witness was made by the dragging of such an object as a man's body over the ground. In the house, on the floor, and between the body and the door, a gun was found, the stock lying nearest and pointing towards the door. The witness thought that gun belonged to the deceased. A butcher knife was found on the floor of the house, and a six shooter pistol in a box in a corner of the house. The house was in great disorder. The scattered dishes and bloody floor indicated that a terrific struggle had recently taken place in the house. After the inquest the witness discovered the tracks of two horses which left the deceased's gate, crossed the road about thirty feet distant, and continued in a north direction to a branch about seventy-five yards distant, thence down the branch until they reached a road leading west, from which point they could not be trailed. The horses that made those tracks traveled in a gallop. Defendant lived about three miles north from Ellick Brown's place.

Cross examined, the witness said that he was familiar with the localities of Lampasas county, and knew where nearly everybody lived in the neighborhood of Brown's house. Several parties lived north from Brown's house, and among them J. H. Bright, whose house was about a mile and a half distant. The witness could not tell from the appearance of the dining table whether or not more than one person ate supper at the house of the deceased on the previous night. The table was

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not "set," but there was a quantity of table ware—cups, saucers, plates, etc.—on it. The gun found in the house was a Winchester rifle, and was said to belong to the deceased. A piece of a nubia was found in the hands of the deceased. That piece did not resemble the nubia that was worn about the neck of the deceased. The bruises on the neck of the deceased indicated choking and not hanging.

H. Wallace was the next witness for the State. His testimony was substantially the same as that of the preceding witness, except that he thought, from the character of the bruises on the neck, the deceased had been hung. In one of the hands the witness found a piece of nubia and a gray hair which he took to be a hair from a man's whiskers The body was found on the floor, but a depression in one of the beds indicated that it had been occupied, at least for a while, on the previous night. Deceased was a bachelor with good property, and always appeared to be sufficiently supplied with money. Witness did not know how much money the deceased usually kept, or was reputed to keep on his person. Witness saw some black hair on the crib where the blood was, but was unable to say whether or not it was human hair.

J. M. Cagle testified, for the State, that he heard of the killing of Ellick Brown on January 2, and on that day went to the scene of the killing with Deputy Sheriff Halbert and a man named Edwards. They found the tracks of three horses which left deceased's house, two of them being the tracks mentioned by previous witnesses. They trailed those two tracks no further than to the point in the road where the other witnesses lost them, but the track of the third horse, which showed a bent nail, was trailed by the witness and his companions a mile further in the direction of McAnelly Bend, to a road where it was lost. While following this trail the witness and his party met the defendant and E. Brown, going towards Hugh Brown's house. E. Brown asked witness what progress he was making. Witness replied that he was following a horse track, and defendant said: "A track is d—d poor evidence." The tracks followed by witness and his party went towards the house of Jim Baker, where a party was given on the night of the murder. The horses that made those tracks may have been going to Jim Baker's party, but the witness first struck them at the house of the deceased; and two of the said tracks traveled down a branch before taking a road.

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Jim Baker testified, for the State, that he reached Ellick Brown's house between one and two o'clock on the evening of the day the body was found. Defendant, among others, was then at the house. While standing on the gallery with defendant the defendant said to witness that he was sorry he was the first person to find Brown's body, but that somebody had to be first. Defendant then suggested that perhaps Brown had been hung, and advised witness to climb to a projecting log of the crib and see if he could find any indications of hanging. The witness did so, and found the imprint of a rope on the said log. On his cross examination the witness said that blood was found on the ground, and on the side of the crib immediately under the projecting log, and that, when defendant suggested the probable hanging of deceased, the various parties standing around were advancing and discussing theories as to how the killing was done.

J. H. Bright was the next witness for the State. He testified that in December, 1886, and January, 1887, he lived on Lynch's creek, in Lampasas county, Texas, about one mile from the house of the defendant, and about the same distance from the house of the deceased. The witness and the defendant were at work together in a cedar brake, in October or November, 1887, when one of deceased's yearlings passed them. Defendant remarked: "That is a fine, fat yearling, and will make good beef." Witness replied: "Yes; I believe I will go and work for Mr. Brown and see if I can't get him to kill it, and get some of the meat." Defendant said: "Old man Brown never eats beef." A minute or two later he said to witness: "What would you think if I were to tell that old man Brown will be killed some day? Will you believe it?" The witness replied that he would not believe it, and the defendant said: "Well, he will be killed some day, and his money will be the inducement." The defendant then asked witness if he thought "Uncle Ellick" (deceased) had any money about him. Witness replied that he did not know, but that deceased had money sometimes. Defendant then said: "If the old man had any money around him, a person would have to hang him, bruise him up, and may be so burn him, before he would give it up or tell where it was." Witness thought that the defendant then asked him if he would join some men to rob or kill the deceased. The witness became angry and replied that he could not conceive how a man could do such a thing. Nothing more

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was said about the matter until an hour later, when the witness asked the defendant: "If I guess the names of the men you want me to go in with, will you tell me?" He replied: "I have told you too much already." The witness then asked the defendant: "What part will you have to perform?" He replied: "All I will have to do will be to find him, or see that it is done complete." On the morning of the Thursday or Friday after the murder, and while the coroner's inquest was still in session, the defendant came to witness's house, and he and witness went to the wood pile. Defendant then said: "You remember the talk we had in the cedar brake? Don't tell any thing that passed between us then." When he left that place, he looked back and said: "Don't tell anything; don't let any five hundred dollars buy you. If you do tell, you will get your light blown out. If I don't, somebody else will."

Cross examined, the witness said that Brown was supposed to have been killed on Friday night. He heard of the killing about one o'clock on the next day, at Wallace's store. The witness, on hearing of the killing, went home and thence to the house of deceased. Defendant was then there, but no conversation occurred there between him and witness. Witness remained at deceased's house until evening, and attended the burial on the next day, and saw the defendant at the grave. He did not see the defendant again until the following Thursday or Friday, when he came to witness's house and asked witness not to tell what passed between them in the cedar brake. No third person was present at either of the coversations between witness and defendant. The witness left Lampasas county and moved to Tom Green county in May, 1887. He did not tell anybody about the cedar brake conversation until some time after he located in Tom Green county. His wife was the first person to whom he divulged the defendant's said proposition to kill and rob the deceased. Defendant left Lampasas county in February, 1887. He told witness, when he left, that he was going to Ellis county. Mr. Martin was the second person the witness told about defendant's proposition. That was in November, 1887. Mr. Martin lived in Tom Green county. In making those disclosures the witness was not influenced by the reward offered for the apprehension of the murderers of Ellick Brown. He did not then know that a reward was offered, but had since learned that fact. He was not now testifying because of that reward. He expected no part and

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wanted no part of it in the event the defendant should be convicted. The reason why the witness did not report the defendant's proposition to kill and murder the deceased was that he was afraid of being killed if he did so. Defendant passed witness's house about ten o'clock on the morning after the death of the deceased. He said that he was going to Ellick Brown's house to see if he could not sell his place to Brown. Defendant's place had been on the market for some time. Witness did not know who were the defendant's "friends."

The State closed.

George W. Lewis, the first witness for the defense, testified that he spent the Thursday night previous to Brown's death at the defendant's house. Witness and his son went to see defendant, who was sick. Witness sat up the larger part of that night, and left the defendant better on the next morning. Besides the witness and his son, no person other than defendant's family and his brother John stayed with the defendant on that night. The reputation of the defendant was that he was a peaceable, law abiding citizen. He was a poor man. Witness bought defendant's place on February 2, 1887, paying him a fair price for the same. Defendant had then been trying for months to sell his place, and once told the witness that he thought he could sell it to Ellick Brown.

Several other witnesses testified as did the witness Lewis as to the reputation of defendant as a law abiding citizen.

The defendant's daughter and his brother John, testifying in his behalf, located the defendant in his house throughout the night of the murder.

A. G. Walker and *J L. Lewis*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. There are two counts in the indictment; the first charges that the defendant and a certain other person, or persons, to the grand jurors unknown, acting together, with malice aforethought, did kill and murder Ellick Brown, etc.; the second charges that certain persons, to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder said Ellick Brown, and that the defendant, prior to the commission of said murder by said unknown persons, did unlawfully, wilfully and of his malice aforethought

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advise, command and encourage said unknown persons to commit said murder, the said defendant not being present at the commission of said murder by said unknown persons.

On the trial of the case, after the evidence had been introduced, the district attorney abandoned the first count and dismissed the same, relying upon the second count only for a conviction, and a conviction was had upon said second count, the punishment assessed being confinement for life in the penitentiary.

Defendant excepted to the indictment because it does not allege the names of the unknown person or persons who committed the murder, or give any description of them. We are of the opinion that the court did not err in overruling the exception. Those provisions of our code which require the name of the accused to be alleged in the indictment, if known, or, if unknown, that a reasonably accurate description of him be given (Code Crim. Proc., arts. 420–425), are not applicable in this case, because said unknown person or persons are not the "accused." The defendant, Jerry Dugger, is the "accused" in this indictment, and is named as such in the indictment. The other person or persons, being unknown, could neither be named nor described, nor was it essential to this prosecution that they should be; nor was it essential to a conviction of the defendant that the evidence should disclose who they were.

In support of the second count in the indictment (the count upon which this conviction is based), there is no testimony except that of the witness Bright. He testified, in substance, that, a month or perhaps two months prior to the murder, the defendant said to him that Brown would some day be killed, and that his money would be the inducement. He then asked witness if he thought that Brown had any money around him. Witness replied he did not know, but that sometimes he did have. He then said if Brown had any money around him a person would have to hang him, bruise him up and maybe so burn him before he would give it up or tell where it was. He then asked witness if he, witness, would go in with some men to rob or kill Brown. Witness answered: "No," and after the lapse of about an hour asked the defendant if he would tell him the names of the men, and defendant answered: "I have told you too much already." Witness then asked him what part he would perform. He said all he would have to do would be to find him and see that it was done complete. Said witness

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testified further that about one week after the murder defendant called his attention to the conversation above related, and told him not to tell anything about it, and stated that if he did tell about it he would be killed.

Is this testimony sufficient to sustain this conviction? We are clearly of the opinion that it is not. It does not show that the unknown murderer or murderers were advised, commanded or encouraged by the defendant in the commission of the crime. It does not show that the "men" to whom he alluded in the conversation with the witness Bright were the murderers of Brown. Brown may have been murdered by other men than those—by men whom the defendant did not know, or had never seen—and if so, he certainly was not an accomplice in the murder. It is not pretended that the witness Bright was a principal in the murder, and Bright is the only known person who was advised, commanded or encouraged by the defendant to commit the murder. It may be that the defendant was an accomplice in the atrocious crime shown by the evidence to have been perpetrated by some person or persons, but we can not pronounce his guilt legally from the evidence before us. If the witness Bright is to be credited, there is strong grounds for suspecting that the defendant was in some way criminally connected with the murder, but suspicion is not proof, and the law demands proof, and such proof as leaves no room for reasonable doubt of guilt.

With respect to the charge of the court, we do not think it subject to the objections made to it. It is, in our opinion, a clear and correct exposition of the law of the case, except, perhaps, that it should have more distinctly instructed the jury that, to find the defendant guilty, they must believe from the evidence that the defendant was not present at the commission of the murder, and that the murder was committed by a person or persons who had been advised, commanded or encouraged by the defendant to commit it.

Because the evidence does not sustain the conviction, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered January 23, 1889.

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No. 2563.

BOB HINES *v.* THE STATE.

PRACTICE—CORROBORATION OF ACCOMPLICE TESTIMONY—CHARGE OF THE COURT—QUÆRE.—If the proof tends to raise the question whether or not a State's witness is an accomplice in the offense on trial, can the trial court, in any state of case, refuse to submit to the jury the question of accomplice *vel non*, together with proper instructions upon the corroboration of accomplice testimony? If so, it must not only be because the proof that the witness is an accomplice is meagre, but because the other proof in the case tends strongly to show that he is not. The proof in this case fairly mooting the complicity of the two State's witnesses, the trial court erred in refusing to instruct the jury upon the law of accomplice testimony.

APPEAL from the District Court of Marion. Tried below before the Hon. W. P. McLean.

The conviction in this case was in the first degree for the murder of Ike Bailey, in Marion county, Texas, on the twenty-eighth day of March, 1888. Death was the penalty assessed against the appellant.

W. B. Stallcup was the first witness for the State. He testified, in substance, that in March, 1888, he was acting constable in and for precinct No. 5, of Marion county, Texas. On Friday, the thirtieth day of that month, the witness was called upon to hunt for Ike Bailey, or for his dead body. Bailey's body, which had been dead some hours, or perhaps days—witness could not say how many—was found on the said Friday in an old field known as the "lake" field. The place in the field where the body was found was about a quarter of a mile distant from the house of the defendant, and about a mile and a half distant from the house of the deceased. The searching party consisted of forty or fifty people. They met at the house of the deceased and proceeded thence to the field of defendant, passing the defendant's house. Will Hartsaw had found the body in the "lake" field when the witness reached him. The witness had known Ike Bailey since the close of the war, and readily identified the body found as that of the said Ike Bailey. The body lay with the arms drawn up to the head, and a trail on the

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Statement of the case.

ground showed that it had been dragged about twenty-five yards. The witness saw three gunshot wounds on the body, one in the left side, one in the forehead and the third struck the skull. The skull was badly broken and appeared to have been mashed in with a blunt instrument of some kind. The witness arrested the defendant and Dan Franklin upon the charge of murdering the deceased. The witness then took defendant before the coroner's jury. Witness had no personal knowledge of any trouble between the defendant and the deceased. The witness had a conversation with Armstead Cove, the half brother of defendant, which led to the finding of the gun which is now in evidence. The piece of wood now exhibited by the witness was part of a broken gun stock which was said to have been found at the place of the murder by Jeff Melton and Jim Mitchell. The gun in evidence was found by the witness about an hour and a half before day on Saturday morning, in a brush heap. It was a double barreled shot gun, the stock broken at the breach, one barrel broken and both barrels bent. The brush heap in which the gun was found was about a quarter of a mile from the place of the killing, in the "lake" field, which was near the field occupied and cultivated by the defendant. The said gun was delivered to Captain DeWare, by the witness, on Saturday morning. John Gray, Will Hartsaw and two or three others were with the witness when he found the gun. The witness saw blood only at the point where the killing occurred. He examined the body of Ike Bailey carefully, but found no weapons of any character on it.

On his cross examination the witness stated that he saw foot tracks near the body, and other foot tracks at the crossing of a branch about seventy-five yards east from where the body was found. The tracks that crossed the branch were the tracks of one man, and they showed that the shoes worn by him were not mates. Henry Davenport was one of the negroes who were with the witness and the parties who examined the foot tracks, and he then had on a pair of shoes which did not mate with each other. Witness did not hear Davenport deny that he made the tracks that crossed the branch, but on the contrary he said that he "passed along there" on Wednesday. Neither the piece of gun stock nor the ramrod were found by witness, and he did not know how far the points at which they were found were from the place of the killing.

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Armstead Cove testified, for the State, that he and the defendant were half-brothers, and that he lived at the defendant's house at the time that Ike Bailey was killed. The witness left the defendant's house early on the morning of the day on which Ike Bailey was killed, and went to Gray's field to work. The broken gun that is now in evidence belonged to the witness. It was in the defendant's house, where the witness always kept it, on the morning of the fatal day, when the witness left to go to work. It was not then broken, but one of the tubes was gone. On the evening of that day the defendant came to Gray's field where the witness was at work, and told him that he, defendant, had killed Ike Bailey, and that in the "rucus" he had broken the witness's gun. On the next morning, at the horse lot, the witness asked the defendant where the gun was, and the defendant pointed to some brush heaps and said: "It is hid in one of them." On the night after the finding of Ike Bailey's body, the witness went with Mr. W. B. Stallcup, who had him in charge, to the brush heaps pointed out to him by the defendant, and found the gun in one of them. The gun was broken when found. Witness turned over two or three of the brush heaps before he found the one in which the gun was concealed. Mr. Stallcup then had the ramrod which belonged to that gun, but witness did not know where he got it. Witness did not remember that he denied to Stallcup that the ramrod belonged to his gun, but if he did it was because he was frightened, and was afraid of the large number of armed men who were present, threatening to hang all of the parties who had been arrested. The barrel of the gun which would shoot was loaded on the morning of the fatal day when witness left defendant's house. When the witness started to Gray's field on that morning the defendant was near his house cutting some poles to repair his fence.

Cross examined, the witness said that the last time he handled his said gun was about two weeks prior to the killing of Ike Bailey. George Marshall was the person who last had the said gun prior to the fatal day. When the defendant came to the witness in Gray's field, on the evening of the fatal day, and told him that he had killed Ike Bailey, he said that Ike Bailey struck him and cut him in the shoulder, and that he then knocked Ike on the head with the gun. The witness observed then that the defendant's coat, which was now in Jefferson, was cut on the shoulder. The defendant's mouth was bleeding

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when he reached Gray's field on that evening, and witness saw indications of a recent wound on his face. The discovery of Ike Bailey's body attracted a large crowd of persons, many of whom were armed. Their evident excitement, and threats to hang all of the parties who had been arrested, frightened and terrified the witness. W. B. Stallcup and Will Hartsaw arrested the witness and took him to the inquest. Some parties then seized the witness and pulled him from the house in which the inquest was being held, and dragged him to the gate, where they were stopped by Mr. Gray and Mr. Colzin, who interfered on behalf of the witness.

On re-direct examination by the State, the witness stated he had never before told anybody that the defendant told him that Ike Bailey struck and cut him before he, defendant, killed him. Witness told the district attorney that the defendant told him that he, defendant, killed Ike Bailey, but he did not remember that he told the district attorney that he knew nothing more about the killing. The gun which the witness and Stallcup found in the brush heap, and which is now in evidence, belonged to the witness That gun was in the defendant's house, loaded in one barrel, when witness left that house on the fatal morning, to go to Gray's field.

Jim Mitchell was the next witness for the State. He identified the piece of wood exhibited to him as the piece of the stock of a gun which he found at the place of the killing. It was, he supposed, a fragment of the stock of the gun identified on this trial as the gun of Armstead Cove, as it fitted to a nicety the broken place in the stock of that gun. The witness found the said piece of wood on the ground where Ike Bailey was killed, which place was about seventy yards from where the body was subsequently found. The witness found it exactly where Bailey's head lay after he fell, as shown by the blood and an indentation in the ground. The ramrod now exhibited to the witness was found on the ground a very short distance from where the killing occurred. Bailey's body was dragged from the point where the killing occurred to the point where it was subsequently found, as shown by the drag mark on the ground. Bailey's body was found in what was known as the "lake," or Posey field, which at that time was cultivated by the defendant —the defendant's house being about a quarter of a mile from where the body was found. There was an old and nearly filled up well a short distance from where the body was found, and

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the head was found lying next and towards the well. The ground indicated that the body had been dragged from the place of killing towards the old well. No weapons of any kind were found on or about the body. The witness saw the defendant very soon after Bailey's body was found, but saw no wounds on his face or elsewhere on his person.

Cross examined, the witness said that the inquest was held on Friday morning, and on that evening the witness went to the scene of the murder to hunt for shot. Mr. Hartsaw was the first person to discover the body. Foot tracks led from the place where witness found the piece of gun stock to where the body was found. He saw other tracks crossing the branch.

M. C. Stallcup, justice of the peace of precinct No. 5, Marion county, testified, for the State, that he knew the deceased in his life time, and knew the defendant. The defendant was charged by affidavit in the witness's court with the theft of seventeen hundred pounds of seed cotton from the deceased. The affidavit was made by the deceased, and the deceased and Henry Davenport were the principal witnesses against defendant. The witness, sitting as an examining court, bound the defendant over to the district court. Subsequently the defendant came to see the witness about replevying the cotton. The witness would have held his next court on March 30, 1888. Deceased was supposed to have been killed on March 28, 1888. No settlement of the cotton matter between the deceased and the defendant was ever reached in the witness's court. Henry Davenport testified on the trial of defendant before witness, in the interest of deceased. Witness had no personal knowledge of a subsequent difficulty between deceased and Davenport about a sum of money that deceased was to pay Davenport for testifying for him. The witness did not know where Davenport was at the time deceased was killed.

Henry Davenport testified, for the State, that some time prior to the death of Ike Bailey the latter and the defendant had trouble about some cotton. Witness knew nothing about the merits of that difficulty, nor did he know as a fact that the cotton taken by the defendant belonged to Bailey. He thought it was proved that the cotton belonged to Bailey.

Cross examined, the witness said that he ate dinner at the house of Mr. Frank Reynolds on the Wednesday preceding the Friday on which Bailey's dead body was found. He had his gun when he left Reynolds's house on that afternoon, but did

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not have a coat nor a shot pouch. From Reynolds's house witness went to Parker's and thence home, meeting Mr. Jeff Melton. Witness was not out hunting, but having his gun he shot a squirrel. From Parker's house witness did not go back to Reynolds's, but went to Adkisson's. The witness was present when Bailey's body was found, but did not on that occasion deny his track which was found near the place where the body was found. It was on Friday night that Bailey's body was found. Witness knew Dan Franklin. Dan Franklin and his sister came to the witness's house on Wednesday night. Witness did not remember that Dan Franklin told him that he was going to Ike Bailey's house to borrow a mule, and that in reply he told Franklin that old man Ike Bailey was not at home but was down in the "lake" field dead, with his brains shot out. The witness denied that he ever told Hartsaw or Melton, in words or substance, that old man Ike Bailey was down in the "lake" field with his brains shot out. The witness denied that he ever received any money from Ike Bailey for swearing for him in the case against the defendant for stealing the cotton. He denied that Bailey ever promised to pay him any sum for swearing for him on that trial, or that he ever said in the presence and hearing of Lucy Marshall, or any body else, that Bailey promised to pay him five dollars for swearing against defendant on that trial, and then refused to pay it. Witness had received money from Bailey as wages for work done. To make his denial emphatic, the witness again stated positively that he did not, on Wednesday night, tell Dan Franklin and his sister that Ike Bailey was out in the "lake" field dead, with his brains shot out. With equal emphasis he re-asserted that, although he saw Mr. Jeff Melton on Thursday evening, he did not tell him that Ike Bailey was in the "lake" field dead, with his brains shot out. He did not tell Jeff Melton that he dreamed that Bailey was in the "lake" field with his brains shot out. Witness went to Mr. Gray's house on that night [which night?], but did not tell Gray that Bailey was dead, with his brains shot out, nor did Gray tell witness that, as he knew Bailey was dead, he was bound to know something about his death. The witness was not with Mr. Hartsaw at the instant that Hartsaw found the dead body. Hartsaw did not call witness's attention to a foot track and tell him that the track was made by a man who wore shoes that did not match. Witness told Hartsaw that he, witness, passed along there on

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Wednesday, the second day before the body was found. The witness said, at Mr. Johnny Gray's, that it was strange that Ike Bailey was missing, as he had agreed with witness to plant corn on the next day—Thursday. The witness's gun was at home and was not broken.

Allen Zachary testified, for the State, that he was one of the congregation present at the Gethsemane church in Marion county, on the third Sunday in March, 1888, on which occasion the Reverend Dyer preached. When services began, the witness, defendant and others were outside. Ike Bailey came to the door and called to all members to come in, as services were about to begin. Defendant said to witness: "Pay no attention to Ike Bailey. He is a grand rascal, and I am going to kill him."

Cross examined, the witness said that the church service referred to by him was held about two weeks before the body of Bailey was found. Witness lived in the "bend," and rented land from Jim Mitchell, who was a witness in this case. A large crowd attended church on the Sunday referred to. Witness knew everybody there, but would not undertake to say what particular person or persons were with him and defendant when Bailey announced the opening of services, and when defendant said that he was going to kill Bailey.

Wallace Clinton testified, for the State, that the defendant came to his place on the Monday night previous to the Friday on which Bailey's body was found. In the course of a conversation with witness, defendant said that he had been required to give a bond about a bale of cotton, and that if Ike Bailey fooled with him he would shoot Ike's heart out and go to the penitentiary. Witness replied: "Bob, if I was you I would not do that." Defendant remained at witness's house until the next morning, and a few days later the witness heard that Ike Bailey was missing. Witness was summoned by Stallcup, and helped to search for the body of Ike Bailey, and saw it after it was found. He saw no foot tracks immediately at the body. The witness and the party he was with then went to the place where, as shown by the indented ground, Bailey was killed, and about ten steps from that place the witness saw (pointing to the defendant's feet) the tracks of those run down shoes. Those tracks were the tracks of the shoes the defendant had on the previous Monday night, and on the morning that the body was found, and that he was wearing on this trial. The witness

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not only observed the tracks and shoes closely, but he knew the defendant's track, and on oath now states that the tracks that he saw near where the killing occurred were the tracks of the defendant. When witness advised defendant not to execute his threat to kill Ike Bailey, defendant replied: "By God, I will do it, and go to the penitentiary."

Cross examined, the witness said that it was at Lewis Watson's house that defendant said he would kill Ike Bailey if he fooled with him, and go to the penitentiary. Defendant got breakfast at Lewis Watson's house, and witness observed his run down shoes on that morning. Henry Jackson came to Lewis Watson's on that morning, and, the witness thought, was speaking to Lewis about some fodder when defendant made the threat. Defendant came to Watson's house in the night, but it was after breakfast when he uttered the threat to kill Ike Bailey. Witness observed the defendant's shoes on that morning more particularly because the day was damp and cool, and the shoes were open and worn. When on the ground where the body was found, the witness heard Mr. Hartsaw tell Henry Davenport not to deny his, Davenport's, track. The defendant did not aid in the search for Bailey's body, and was about the only resident of the neighborhood who did not.

Alf Quinn testified, for the State, that he was one of the party that made the search for the dead body of Ike Bailey. The defendant was not one of the searching party. At the place where the body was discovered the witness found a hat and coat, a saddle and a blanket. He saw a gun at the same place, but was not present when the gun was found. Soon afterwards, at Ike Bailey's house, the witness saw a ramrod in the possession of Mr. Stallcup. The ramrod in evidence is the ramrod he saw at Bailey's house in the possession of Stallcup. He recognized it then and identifies it now as a ramrod he, witness, made. He and Jimmy Dedman went coon hunting one night previous to the death of Ike Bailey, and took the gun in evidence with them. There was then no ramrod to the gun, and the witness made the one that is now in evidence. On his cross examination the witness said that there could be no mistake about the ramrod being the one he made for the gun in evidence. Witness had a general acquaintance with that gun, and had used it since the night on which he took it coon hunting and made the ramrod for it. He borrowed the gun on that night from Jimmy Dedman. It was not a neighborhood

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gun. It was on Friday night that witness saw the ramrod for the first time after the disappearance of Ike Bailey. It was then in Esquire Stallcup's possession. The hat, saddle and blanket belonged to Ike Bailey. Witness did not see a bridle at or near the place where Bailey's body was found. On the previous day—Thursday—the witness saw Ike Bailey's mule. It had on a bridle but no saddle nor blanket. Bailey let his mule run out, but not on the range in which witness saw it. At the time that the witness made the ramrod that is now in evidence the gun belonged to Jimmy Dedman.

Jim Dedman testified, for the State, that at one time he owned the gun that is now in evidence. He had not seen it for a month or more at the time of the killing of Bailey, and did not know who owned it at that time. He remembered going coon hunting with Alf Quinn some time before the killing, and of taking the said gun along, and it was his recollection that Quinn made a ramrod for the gun on that night.

W. B. Stallcup, recalled by the State, testified that the gun was broken and bloody when he found it. Some of the blood came off and stained the witness's hands. Witness last saw the gun on the day previous to this testimony. It was then in the possession of Captain DeWare, and was in the condition it was when found.

T. C. Burks testified, for the State, that he remembered the examining trial of the defendant upon the charge of stealing cotton from Ike Bailey. It occurred about three weeks prior to the killing of Ike Bailey. The result of that trial was the binding over of defendant to the district court. On the day of, but after the examining trial, the defendant appealed to the witness to go on his bond. In urging witness to sign the bond, he said that witness would assume no danger or loss, as Ike Bailey would never get into court.

Cross examined, the witness said that the bond defendant requested him to sign on the day of the examining trial was an appearance and not a sequestration bond. He did not on that day ask witness to sign a sequestration bond, but did afterwards, when witness declined. When he asked witness to go on the appearance bond, the defendant asked witness how he could get possession of the cotton, and he afterwards requested witness to sign his sequestration bond. The cotton which defendant was charged with stealing from Bailey was hauled to the witness's gin by the defendant. It was not afterwards

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placed in the witness's custody by legal process, nor was it seized by an officer under legal process, but was turned over to Ike Bailey by the witness upon the order of Mike Stallcup. Defendant lived on witness's place two or three years. Witness, though now on friendly terms with defendant, was then a little "wrathy" with defendant, and declined to go on his bond because he was not willing to help a man who would not pay him what he owed.

John Watts testified, for the State, that he saw Ike Bailey, at his, Bailey's, house on the morning of his death—Wednesday, March 28, 1888. Bailey was then at home. His mule was tied at the fence in front of his house, and he told witness that he was going off to hunt for his other mule. Cross examined, the witness said that he was passing Bailey's house when he saw Bailey on the fatal Wednesday morning. Bailey shut the door of his house and came to the front gate. Witness saw no person but Bailey at the time, but could not see into the house. The witness, who was related to Bailey by Bailey's marriage, lived on Mr. John Gray's place. Bailey's wife was dead, and no person was living with Bailey at the time of the murder.

Nathan Wilson was the next witness for the State. He testified that he had a conversation with the defendant a few days before the killing of Ike Bailey. Defendant, on that occasion told witness that he had a world of trouble, and that Ike Bailey would not be a living man when Mike Stallcup's court next convened. Cross examined, the witness said that he lived in the "bend," and in the neighborhood in which defendant lived. Witness did not like to have defendant living where he did. In fact the witness did not like that neighborhood. The neighborhood further up the river—about where Mr. Stallcup lived—was more to the liking of witness. It "beat" defendant's neighborhood. It was more pious, and the climate was better. No person was within a quarter of a mile of witness and defendant at the time of the conversation in which defendant said that Bailey would not be a living man when Stallcup's court met. Stallcup's court was not in session on that day. The witness knew that the defendant had a case in Stallcup's court, but he did not know that it had already been decided. The witness was not engaged in preaching on the day of the conversation with the defendant. He was engaged in cutting rails at a point between three and four hundred yards distant

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from Pleas Goyne's house, and just beyond Shar Smith's house, and not far from the pond near Smith's store. Defendant, on his way to town, after eating dinner at Goyne's house, went with witness to where he was splitting rails. He first met defendant on that day just beyond the pond, the witness then being on his way to Smith's store for a plow point that was wanted on the widow Luster's place. Defendant said something about the cotton trouble beeween him and Ike Bailey, but that part of the conversation already stated by witness was all that he recollected. Witness afterwards told Cal Bailey, Ike Bailey's step son, what defendant said to him.

Ida Marshall testified, for the State, that she lived with her mother, who lived on defendant's place, less than half a mile from defendant's house. She knew Ike Bailey's mule. That mule, with only a bridle on, came to the house of the witness's mother late on one cloudy evening. It went thence towards the branch. Witness did not know from which direction it came to the house.

Doctor T. H. Stallcup testified, for the State, that he saw the dead body of Ike Bailey on the morning of March 30, 1888, at which time, as indicated by the progress of decomposition, it had been dead from forty-eight to seventy-five hours. There were three gun shot wounds on the body. One shot entered the left hand, between the third and fourth fingers. Another entered the left side. These two wounds were superficial, or at least would not have produced death. The third wound, which was necessarily a fatal one, and which must have caused instantaneous death, entered the forehead. The skull was also fractured in two places, the result of blows inflicted with a bludgeon, either of which fractures was in itself a necessarily fatal wound. The witness extracted the ball from the head, which was now in the possession of the witness's brother, who was in court. The ball, being obtained, was exhibited to the witness, who stated that he could not say that it was the ball he extracted from the head of Bailey. The ball he extracted he thought was a thirty-two calibre pistol ball. The witness knew but little about pistols or pistol balls. The skull wounds were of such character as would have paralyzed Bailey and rendered him insensible. Those wounds alone, if inflicted on March 28, and Bailey was left as he fell until March 30, must have produced death, independent of the gun shot. The witness did not think that, after receiving the skull wounds the

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deceased could have crawled. Witness had known men to recover from gun shot wounds in the head. He had known men to survive skull fracture, and to recover after the removal of a piece of skull as large as a man's hand.

Armstead Cove, recalled by the State, testified that he did tell Doctor Stallcup (meaning, evidently, Esquire Stallcup) that when the defendant came to him in the field on the evening of the fatal day, blood was flowing from his mouth. He denied that his statement was that there was nothing the matter with defendant except that there was a small "splotch" of blood under one eye.

Mike (Esquire) Stallcup, recalled by the State, testified that he saw defendant soon after his arrest. At that time there were no visible wounds or scratches on his person. Soon after that the witness had a conversation with Armstead Cove, in the course of which said Cove stated that there was nothing whatever the matter with defendant when he reached the field on the evening of the fatal day, except that he had a small "splotch" of blood on his right hand and another under the eye. He did not say that blood was then flowing from defendant's mouth. After the prosecution against defendant for stealing Bailey's cotton was instituted, and after witness bound him over to the district court, the defendant several times spoke to witness about instituting a suit to try the right of property to the cotton. Judging from a note about the matter, written to him by Mr. Rowell, the witness supposed that Rowell was to act as attorney for defendant in that matter. On cross examination the witness stated that Ike Bailey was in town when his cotton was claimed to have been stolen by defendant. Henry Davenport was the principal witness who testified against the defendant on the examining trial. Ike Bailey was also a witness, and testified to the ownership of the cotton and to the want of consent to the taking of the same. The ball now exhibited to the witness was the ball that was taken from Ike Bailey's head.

W. B. Stallcup, being recalled by the State, testified that there was but one tube on the gun when found by him and Cove. There was a part of an exploded cap on the other tube. It did not appear to have been long exploded. Cove went direct to the particular brush heap in which the gun was found, and went direct to the particular side of that brush heap where it was concealed.

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Will Hartsaw testified, for the State, that he found the dead body of Ike Bailey in the edge of an old field, near an old well that was filled up to within four or five feet of the surface. Fifty or sixty people, some horseback and some on foot, were "breasting" through the woods, about fifty yards apart, when the witness discovered the body. He immediately blew his horn, and the crowd gathered about the body. Mr. Stallcup was among the last of the party to reach the body. The body was examined where it was found, but no weapon of any kind was discovered about it. Further search discovered the place where Bailey was killed, and where he had been dragged or had crawled to the place where the body was found. Near the place of the killing a ramrod, but no gun or other weapon, was found. On the next morning, before day, Armstead Cove went to a brush pile and got the gun. The witness was one of the parties who went with him. Cove got the gun from the brush heap he first went to. That gun was broken, and is the identical gun that is now in evidence.

William Watts testified, for the State, that he was the nephew of Ike Bailey. He knew the defendant and knew that, about the time of the killing of Bailey defendant owned, or had possession of, a white handled five shooting pistol.

On cross examination, the witness said that he did not know that the pistol he saw in the defendant's possession on or about the time of the killing was the property of Jim Williams, nor did he know that Jim Williams owned a pistol. The witness was present at the inquest, and knew that defendant and Armstead Cove were taken to the woods. He knew that neither defendant nor Cove were tied when they were taken from the inquest into the woods. He knew nothing about defendant being hung to a tree.

W. B. Stallcup, being again recalled by the State, testified that he arrested the defendant on Friday night, on the premises of George Gray, and about a mile from defendant's house. It was about eleven o'clock when he made the arrest. Defendant was then lying on a pallet with Dan Franklin in an unlighted room. Witness went to the defendant's house before he went to Gray's place. The witness did not know that defendant plowed on Gray's place for Mr. Gray on that Friday.

Alex Walton testified, for the State, that he was at George Watts's house when defendant was there on the day referred to by the witness William Watts. That was about a week before

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Bailey was killed. Defendant had a white handled five shooting pistol on that day. Lucy Marshall lived on the place of the defendant.

On his cross examination, the witness said that he saw the pistol in defendant's possession at George Watts's place prior to the time above mentioned—about a month before. On that occasion defendant pulled the pistol on the witness, who had offered to fight him a fair fight if he would lay the pistol down. The pistol was a thirty-two calibre, and at the time last referred to it belonged to Dan Franklin. Witness's wife was a sister of Watts, and a niece of Bailey.

Sheriff DeWare testified, for the State, that, in answer to a note from Mr. Stallcup, he started to the place where Bailey was killed, between five and six o'clock on Saturday morning. He met the party taking defendant to town. He had defendant in his personal charge for twenty miles, but observed no scratches nor bruises on his person.

The State closed.

The defense recalled Doctor T. H. Stallcup as its first witness. Doctor Stallcup testified that he was unable to state whether Bailey was standing on his feet or was lying down when he was stricken on the head with the bludgeon. It was possible, but not at all probable, that Bailey was lying down when the blows on the head were inflicted. The witness thought the other wounds on Bailey were inflicted by pistol balls.

Henry Jackson testified, for the defense, that he went to the house of Lewis Watson on the day referred to by Wallace Clinton. He saw the defendant there on that day, talking to Wallace Clinton, but he did not notice the shoes then worn by the defendant.

Sheriff DeWare, recalled by the defense, identified the gun in evidence as the gun that was delivered to him by Mr. Stallcup. The right hand barrel of the gun was then loaded and is loaded yet. The load was then extracted and exhibited to the jury. It consisted of a mixture of turkey and bird shot.

Jeff Melton was the next witness for the defense. He testified that he was in his field on the evening before Bailey was killed, and that Henry Davenport came to the field on that evening. Bailey disappeared on Wednesday. On the evening of that day the witness saw Davenport back of his, witness's, field. Davenport then had a shot gun in one hand and a squir-

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rel in the other. Davenport came to the witness's house on the night of the next day, Thursday, and said that Bailey was killed; that he knew Bailey was dead, because he left home and had not come back, and was still missing. He added: "He (Bailey) is killed, and his head is shot all to pieces." Witness remarked in reply: "How do you know he is killed? You must be implicated." Witness then said to Davenport: "I was sitting up with my children and heard a pistol shot." Davenport replied: "That shot didn't finish him. We went back and finished him after that shot." The witness was one of the first parties to reach Bailey's body after it was discovered. At a point about seventy-five or eighty yards distant from where the killing took place a track was found, and, although it could be found nowhere else than on the branch, it looked to have come direct from the body. The man who made that track avoided sandy places, and went up the branch above the ford and crossed under some brush. Henry Davenport was there, and his attention was called to that track. The witness found the ramrod that is now in evidence, and saw Bailey's hat and saddle near the place of the killing. The saddle was found about one hundred yards northeast from where the body was found, and about thirty steps from where the body first fell. The place where the witness found the ramrod was very nearly in the same direction from where the body was found that the saddle was; and, in going from the place where the ramrod was found to the place where the saddle was found, one would go in an almost direct line towards the body. Witness found no tracks along the "drag" from the place where the body fell to where it was found. When found the body was lying back down, and the hands were muddy. When the witness saw Henry Davenport on Wednesday evening—he could not say what time it was—he was going from the direction of the place where the killing occurred. Witness did not see Davenport after that until the following night. Witness saw, on the left hand side of the "drag," the tracks of what he took to be a small, high heeled shoe, and at the place where the body fell, very near to the indentation of the ground made by the head and shoulders of the body, the witness saw the track of a run down shoe. That track was different from the track found on the branch.

Will Hartsaw, recalled by the defense, testified that he saw Henry Davenport on the night before the body was found. On the next day Davenport reported that Bailey was missing.

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Witness asked Davenport what had become of Bailey, and then, in reply to what Davenport said, how he knew that Bailey was dead. He replied that he knew Bailey was dead, and that he was shot all to pieces. He did not say where Bailey's body could be found. The witness saw the track on the branch about seventy-five yards from where the body was found, which track resembled the track of Henry Davenport. He told Davenport about that track and its remarkable resemblance to his track. Davenport replied that he did not deny that track as his, and that he had been at that place. The track which the witness took to be Bailey's track was a large track, and Bailey had on a new pair of number twelve boots. That track was running. The smaller track was also running. It was apparent from the tracks that the man who made the small tracks pursued the man who made the large track. There was no indication of a scuffle at the point where Bailey fell. On his cross examination the witness said that the track which resembled Davenport's was going almost direct—a very little angling—from the direction of the place where the body was found.

Dan Franklin testified, for the defense, that he lived on the place of George Gray, in the "Bend." The witness first heard of the disappearance of Ike Bailey on Thursday night at the house of Henry Davenport. Davenport told witness on that night that Ike Bailey was dead; that he knew Bailey was dead; that he went off on Wednesday and had not come back. He said: "Ike Bailey is dead, and he is somewhere in that 'lake' field." He said that he only imagined that Bailey was dead. The witness was arrested on the premises of Mr. Gray on Friday night. The witness and defendant were working—plowing—for Mr. Gray when the successful search for Mr. Bailey's body was made. The witness occupied a house on Mr. Gray's place, and with defendant and Jim Williams was sleeping in that house when the arrest of himself, defendant and Williams was made. Witness had no pistol on that night, but Williams had one. The witness once owned a white handled pistol. On his cross examination this witness said that Jim Williams had his washing done and kept his clothes at the defendant's house, but did not keep his pistol at defendant's house. If the pistol was at defendant's house on Thursday the witness did not see it. The witness denied that he told Davenport that old man Ike Bailey had been killed, and that when his body was found,

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his head would be found shot all to pieces. He denied that he ever told old Aunt Violet Davenport that Bailey had been killed, and that the killing was done with his, witness's, pistol. The witness and defendant were not the only parties in the neighborhood who did not join in the search for Bailey's body. Alex Courtenay and several others did not aid in the search. At that time Mr. Gray was on the witness's bond as a defendant in the charge of stealing Ike's cotton, and when witness was called upon to join in the search he had to go to Gray's to report where he was going to. Gray would not consent for the witness to go, as he said he did not want his plows stopped; consequently—and for that reason—the witness could not join in the search. On his re-examination the witness said that it was after supper on Thursday night when he went to Davenport's house. He stayed there all night, as did Henry Davenport. The white handled pistol which the witness once owned, he bought from Frank Reynolds.

Frank Reynolds testified, for the defense, that he lived about a mile and a half from defendant's house. Witness saw Henry Davenport in his, witness's, field between ten and eleven o'clock on the fatal Wednesday morning. Davenport went to witness's house between eleven and twelve o'clock on that day, ate dinner there and left between one and two o'clock. When he left he went east from witness's house, across the edge of the field and towards the "lake" field. He then had a shot gun, and a shot sack across his shoulders, on the outside of his coat. He went directly towards the point where the body was afterwards found. Before the arrival of Henry Davenport the witness heard some shooting from the direction of the place where the body was afterwards found. From what Davenport said to him on his arrival, witness supposed he did the shooting. He said to witness: "Now, suppose me and another negro was to get into a rucus, you white men ought not to have anything to do with it." Henry Davenport had never before been on the witness's premises, so far as the witness knew.

Cross examined, the witness stated that Henry Davenport could not be said to have stayed to dinner at witness's house on his, witness's, invitation, but, being there at dinner time, witness gave him his dinner. Prior to that day the witness had tried to sell to Davenport a certain hog of his that was running in Davenport's range, and on that day he renewed the negotiation in an effort to exchange the hog for some cotton which

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Davenport had. Davenport said that he would have to consult his wife before trading, that he had promised to give her some money with which to buy Christmas "tricks." When Davenport left witness's house, after dinner on the said Wednesday, he went northwest toward the "lake" field, remarking that he was going to kill some squirrels. Henry Davenport, on that day, told witness that he had been to old man Atkisson's house. He did not say that he had been at work for Atkisson. He said that he was afraid somebody would kill him.

George Gray testified, for the defense, that he went to the place where Bailey was killed, and where his body was found, four or five days after the finding of the same. Those places were about a quarter of a mile distant from Davenport's house, and on the most direct route from the defendant's house to the land which he, defendant, was then cultivating, and which land he rented from the witness. Defendant came to the witness's house a day or two before the finding of Bailey's body, and, while sitting on the horse block at witness's house, he spat a mouthful of blood. That was between three and four o'clock on Wednesday evening. The witness knew Jim Williams, but did not know his present whereabouts, nor where he was at the time of the killing of Bailey. Williams was in the witness's employ at the time Bailey disappeared. He then owned a white handled pistol. A week or two before Bailey was killed Williams got to shooting the pistol about the place, and witness took it away from him and put it in his, witness's, trunk. It was taken out of that trunk about a week after the killing. If the defendant ever owned a pistol the witness did not know it. The defense closed.

The State, in conclusion, introduced as a witness Violet, the wife of Henry Davenport. She testified that Dan Franklin came to her house on the night that Bailey's body was found, and asked if she knew where Bailey was. He then told witness that Bailey was missing, and asked if witness knew whether or not there was anything wrong with Bailey. He then said: "If Ike aint come back yet, then Ike is killed, and, wherever he is, he is killed with my pistol, for I sold it to Jim Williams. Whoever has done it, I hope they have left life in him, so he can tell who it was."

Cross examined, this witness stated that she and her husband worked for Bailey on Tuesday, the day before his disappear-

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ance. Bailey told them on Tuesday night to be certain to return on Thursday morning. They went back on Thursday morning and worked on Bailey's place until about four o'clock in the evening. The witness and her husband were the first persons to feel uneasiness about Bailey. The witness did not know where her husband was on Wednesday morning. He was not at home to dinner. When he got home that evening he said that he got his dinner at Mr. Reynolds's house. The witness did not know what time Henry got home on that Wednesday evening. Henry had neither coat nor shot sack when he left home on Wednesday morning. Witness was lying down when Henry got home on Wednesday evening. He asked her what was the matter. She replied that she was lying there thinking of what had become of old man Ike Bailey. Henry replied that if old man Ike was killed and misplaced he was very sorry.

W. T. Armistead, J. H. Culberson, Camp & Taylor and *J. E. McComb,* for the appellant: A conviction can not be had upon the uncorroborated testimony of an accomplice, and the evidence in this case being sufficient to moot the complicity of the State's witness Cove, the trial court erred in failing and refusing to instruct the jury upon the law applicable to the corroboration of an accomplice witness.

Does the evidence in this case raise the complicity of the witness Cove? The ramrod found on the ground near the dead body was identified positively as the ramrod of his gun, and the broken gun produced in evidence was identified and admitted by him to be his gun. He was the person who first told where the gun was concealed in the brush heap, and he went directly to the brush heap with the officer, and there got the gun and delivered it to the officer. According to his own sworn statement on the stand, he kept locked in his own breast the secret of Ike Bailey's death—protesting, indeed, that he knew nothing whatever about Bailey's disappearance—from Wednesday until midnight of Friday, when he disclosed it only under the influence of fear, superinduced by the presence, if not the threats, of an armed body of men. The said witness Cove was shown to live at the house where the gun was usually kept, and it was proved that he passed through the lake field on the evening of the killing.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

HURT, JUDGE. This is a conviction of murder of the first degree, with the death penalty. We have carefully examined all the grounds relied upon for a reversal of the judgment, and are of the opinion that none are well taken except that contained in the third assignment, to wit: "The court erred in failing and refusing to charge the law applicable to the corroboration of an accomplice, the witness Armstead Cove being an accomplice." The court's attention was called to this subject, and counsel requested a charge thereon, but did not prepare the charge. The court refused to prepare and submit to the jury instructions relating to this subject, and counsel for appellant excepted and reserved a bill.

No doubt the learned trial judge did not believe there was any evidence in the case raising this question, and hence the failure to charge thereon. It will not be questioned that if there be such evidence it was the duty of the court to instruct the jury with reference to the necessity and the character of corroboration required to authorize a conviction upon the testimony of an accomplice.

Was there evidence reasonably tending to show that Cove or Davenport, or any other witness upon whose testimony the State relied for conviction, was an accomplice? If so, under the facts of this case, the court should have instructed with reference thereto. What are the facts?

On Wednesday, March 28, 1888, in Marion county, Texas, in what is known as the Bend neighborhood, the deceased, Ike Bailey, left his house two miles from the "lake" field, where he was afterwards, on Friday, the thirtieth of March, found dead. He had evidently been killed, as in his head and body were two gun shot wounds, apparently of a rifle or pistol of thirty-two calibre. His skull was also fractured by blows from some heavy instrument. The body was found in the "lake" field about three hundred yards from the house of defendant Hines, on a path or road leading from Hines's house to the Gray field which Hines cultivated, and about twenty steps from an old well. Near the body of deceased were his saddle and saddle blanket. Wednesday evening, the same evening deceased left home, his mule, with bridle but no saddle or blanket on, was seen going from the "lake" field. A ramrod and a piece of the stock of a shot gun were found near the body. This ramrod was identified as the ramrod of Armstead Cove's shot gun, also the piece of gun stock. The tracks of Henry Davenport

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were found going towards and from the body. Davenport was seen going in the direction of the "lake" field a short time before the killing, with a gun, and was seen going from the field late Wednesday evening. Late Wednesday evening, when Ike Bailey did not come home, Davenport told witness that Ike Bailey would not come home, that he had been killed, and his head shot and beat all to pieces. Thursday he told another witness the same in substance, and said he had been killed in the "lake" field. Wednesday Davenport ate dinner at witness Frank Reynolds's house—had his gun. He said to Reynolds: "If me and another negro gets into a rucus, you white men ought to have nothing to do with it." In the evening he went off with his gun in the direction of the "lake" field. Just after the shots were heard in the field, Davenport was seen going from the direction of the place where the shots were heard and the body afterwards found. He also told witness on Thursday, after the killing, that the first shot did not kill Ike Bailey. Davenport and his wife knew that Ike Bailey went to the "lake" field that evening, and were the only persons who knew of this so far as the evidence shows.

Witness Armstead Cove was the half brother of appellant, lived with him, and owned an old shot gun in very bad repair. The ramrod and piece of stock found by the body belonged to this gun. The night of the evening the body was found Armstead Cove, Henry Davenport, Jim Williams and appellant, were arrested and taken to the inquest separately. The constable was there, and also a crowd of armed men in an excited condition, threatening to kill all the prisoners. The prisoners were taken out and threatened with death if they did not confess. When it was brought to the knowledge of Armstead Cove that the ramrod was identified as being his, and himself being threatened with death, he said the appellant, Hines, told him at the horse lot that he had killed Ike Bailey with his (Armstead Cove's) gun, and pointed to some brush heaps and said the gun was under one of them. One hour and thirty minutes before daylight he, with the constable and others, he guiding them, went straight to the brush heap, and to the side of the heap where the gun was, stopping at no other, though he insisted that he had examined several others before finding the gun.

Ike Bailey (the deceased) and Bob Hines had had some trouble about some cotton, in which it was charged that Hines stole

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the cotton from Bailey. Hines was under bond to appear to answer the charge. Davenport was the principal witness against Bob Hines in the cotton case. Two or three witnesses testified that Hines had threatened to kill Bailey.

The State attempted to explain some of the facts which tend to show that Cove and Davenport were accomplices, but this being a question for the jury, the court could not assume that the explanations were full and complete and withdraw the question accomplice *vel non* from the jury or refuse to call their attention to this question by proper instructions.

Again, there is no attempt to explain some of the most cogent facts which tend to show these witnesses to be accomplices. We mean by explain, to render these facts completely consistent with the hypothesis that neither Cove nor Davenport was an accomplice. Let us present a case so as to illustrate our views upon this subject.

There is evidence in a case tending to show that a witness upon whose testimony the State relies alone or in part for conviction was an accomplice, but the other facts in the case render it reasonably certain that the witness was not an accomplice. Can the trial judge assume these facts, to wit: the facts which render it reasonably certain that the witness was not an accomplice, to be true, and refuse to submit to the jury the law relating to the testimony of an accomplice? We seriously doubt if in any case the judge can so assume, and refuse to instruct upon the question of an accomplice. But to warrant the court in thus acting, the case must be one in which the testimony which tends to show the witness to be an accomplice is very slight, and the other facts must render it absolutely certain that he (the witness) is not an accomplice. The rule that the court should charge upon the theory of the case relied upon by the accused, should be applied to this question.

But, there being evidence strongly tending to show that Cove and Davenport were accomplices, do the other facts in the case render it even reasonably certain that they, nor either of them was not an accomplice? They do not; and hence the necessity for the proper instructions relating to the testimony of an accomplice.

We will relate briefly the facts bearing on Cove, which tend to show him an accomplice. Deceased was killed with his gun. He had access to the gun, it being in his house. He denied all

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knowledge of the crime. He went at night with the officer and others to the brush pile—guiding them. He went to the pile, there being a number of brush piles in the clearing, in which the gun was concealed. He went direct to *the* pile containing the gun, and he went directly to *the side* of the pile where the gun was concealed. Upon the trial he swears that he went to several piles before he found the right one. This was shown to be false. Now, Hines may have told him where the gun was concealed, and may have given him such a description of the brush pile, its locality, etc., as to enable him to go at night directly to it; this, however, would be remarkable. But to give him such a description and such directions as to enable him to go at night directly to the right pile, and to the side of the pile of brush at which the gun was concealed, is not reasonable. Especially so, when considered in the light of his statement bearing upon this matter. He says that Hines told him that he had killed Ike Bailey with his (Cove's) gun, and pointed to some brush heaps and said it was under one of them. There is no pretense that the appellant pointed out the particular pile, or gave the witness such description of it as would enable him to go directly to it. This is contradicted by the witness himself, in this, that he "did turn down two or three brush heaps in hunting for the gun."

Now, under these facts it is reasonable to infer that this witness did not obtain knowledge of the whereabouts of the gun from the defendant. But, be this as it may, these facts, tending strongly to inculpate the witness either as a principal or an accessory, the question of accomplice *vel non* should have been submitted to the jury, with instructions that if they found him to be an accomplice then, to convict on his evidence, he should be corroborated as the law directs. As to whether Davenport was an accomplice or not, that also should have been submitted to the jury with proper instructions.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 26, 1889.

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Statement of the case.

No. 2641.

C. H. HUGHES v. THE STATE.

1. PRACTICE—EVIDENCE—BILL OF EXCEPTION to the admission of evidence must disclose the ground of objection; otherwise it is not entitled to be considered on appeal.
2. MURDER—FACT CASE.—See the statement of the case in this, and in the case of ex parte Smith and Hughes, 26 Texas Court of Appeals, 134, for evidence *held* sufficient to support a conviction of murder of the first degree.

APPEAL from the District Court of Leon. Tried below before the Hon. N. G. Kittrell.

The conviction in this case is in the first degree for the murder of Robert Martin, in Leon county, Texas, on the sixth day of May, 1888. A life term in the penitentiary was the penalty assessed by the verdict.

The appellant in this case was one of the relators in the Smith and Hughes habeas corpus proceedings reported in the twenty-sixth volume of these Reports, beginning on page one hundred and thirty-four. Of the witnesses who testified on the habeas corpus proceedings, Messrs Bryan, Vick, Ike Martin, Owens, Bolter, the district clerk, Joyce, Mrs. Susan Hughes and Miss Jennie Hughes testified on this trial, their narratives on the two trials being substantially the same. This report comprehends the testimony of witnesses who did not testify on the habeas corpus proceedings.

Cape Cowart testified, for the State, that he lived in Freestone county, Texas. The deceased and witness's brother Jesse had a herd of cattle at the latter's stock pens, in Freestone county, on the evening of May 3, 1888. The witness, the deceased, Ike Martin, James and George Collins, J. T. Windham, and perhaps others, were at said stock pens on the said evening when the defendant, Ed Smith, James Smith, George Smith, J. P. Parker, Jr., Henry Parker and Louis Davis arrived, each of said parties being armed either with a shot gun or a Winchester rifle. Defendant had a shot gun. One of the party, J. P. Parker, Jr., according to witness's recollection, said that the

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party wanted to examine or inspect the herd. Deceased replied that he had no objection to an inspection by honest gentlemen, but that no God d—d midnight assassin could inspect them. The witness and others prevailed on deceased to permit James Smith to examine the herd. Mr. James Smith reported the herd all right, but that it contained an unbranded heifer. Ike Martin, the brother of the deceased, claimed that heifer. The defendant and his party then left.

Shorty Martin, a brother of the deceased, testified, for the State, that a conversation between the defendant and deceased occurred in the hearing of the witness, near the witness's house, between sun down and dark on the evening of May 1, 1888. Ed Smith was with defendant at the time. Deceased told defendant that he was going away soon, and wanted a settlement with him, defendant, who owed him, deceased, for supplies. Defendant replied that if deceased would come to his house they would settle d—d quick. The deceased replied that he had the books, and the place to settle was there. A quarrel then ensued between the defendant and the deceased, in the course of which the defendant said that if the deceased did not mind, he, defendant, would settle with him before he left, between two suns.

West Williams testified, for the State, that on the evening of Friday, May 4, 1888, while he and defendant were working the road, about eleven miles from Buffalo, defendant said to him: "Bob Martin talked to me pretty rough a day or two ago, and I don't intend to stand it. One day ain't always."

Miss Bettie Hay testified for the State, that on the night of Monday, May 7, 1888, about twelve o'clock, she was awakened by the reports of fire arms discharged near the house of her mother. A minute or two after the shots were fired, Mr. Linson came to the house and said that somebody had just shot a prisoner he had in custody. The witness's mother went to the place indicated by Linson, and witness followed as soon as she could get ready. Very soon after the witness reached the deceased, who was then lying on the ground, wounded, he said of his own motion, and not in reply to questions: "Smith and Hughes did the shooting. I saw them by the flash of the gun, and the Parkers are into it." A minute or two later he said: "I am bound to die" or "I am dying." Witness understood him to say: "I am dying." About thirty minutes later he said: "Smith and Hughes did this." Presently he asked wit-

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Statement of the case.

ness and her mother to pray for him, and attempted to pray himself, as directed by witness. Very soon after witness reached the deceased, Linson left to go for Mr. Bradford, who lived but little more than a quarter of a mile distant, and as witness, who was much excited, computed the time, he was gone about twenty minutes. Deceased said nothing, but groaned during Linson's absence. On his return, Linson asked deceased if he wanted some water. He said that he did. Witness then went to the house, fifty yards distant, and returned, making the trip as soon as she could, and it was immediately upon her return that deceased made his first statement. He several times said: "I am dying." He talked at intervals until he died, an hour or more after he was shot, but at no time spoke in a manner to indicate any hope of recovery or other expectation than to die.

Frank Watson testified, for the State, that he was bookkeeper in the mercantile establishment of J. M. Pearlstone & Son. During the year 1887, the deceased became security at Pearlstone's store for supplies furnished the defendant by Pearlstone, and afterwards paid the account.

James Smith testified, for the State, that on his way to Buffalo, on Tuesday morning, May 8, 1887, he stopped at the field of his brother, Ed Smith, where he found his said brother and this defendant, and Messrs. Teeter and Faulk, two young men who were then on their way to inform the relatives of the deceased of the killing of the latter on the night before. The witness, while in the said field, told defendant that he had been told that a straw hat had been found on the ground of the killing. Defendant replied: "I reckon my hat is at home, unless it has been destroyed." As witness rode off, defendant called to and asked witness if he was going to Buffalo. The witness replied that he was, and defendant said to him: "My hat may be at home or it may be destroyed. You get me one while at Buffalo to-day." He then proceeded to describe to witness the place in Pearlstone's store where he would find the hats. Witness asked: "Shall I tell Barney Pearlstone to send you one?" He replied: "No; get me one out of the box behind the door." Witness replied: "I can't do that." Defendant said: "All right; I know my hat is at home anyway, unless the children have torn it up."

H. J. Childs testified, for the State, that he was sheriff of

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Statement of the case.

Freestone county in May, 1888. On the night of Saturday, May 12, 1888, the witness went to the house of Ed Smith and arrested him, the said Ed Smith. After serving the warrant, witness asked Smith where his black straw hat was. Smith pointed to a straw hat hanging on the wall, and said: "There it is." The hat which is now in evidence, being one of the two exhibited on the inquest, looked to be the hat pointed out by said Smith. Smith said he got the hat from Pearlstone on the Friday before the assassination of Martin.

Ed Smith was the next witness for the State. He testified that he was charged by separate indictment with the same murder for which this defendant was now on trial. The said murder occurred on the night of Monday, May 7, 1888. The witness was at work in his field on that day, when he was joined by the defendant, who was armed with a shot gun. About an hour and a half before sun set, J. P. Parker, Jr., and Henry Parker came by the field and spoke to witness and defendant. Defendant followed them to a point behind a hill beyond the view of the witness. Defendant returned to where the witness was in a short while, and told witness that a plot to kill Bob Martin on that night was agreed upon, and that he wanted the assistance of the witness. He then said that he and J. P. Parker, Jr., Henry Parker, W. T. Linson and the negro Lewis Davis were the parties to the plot, and that witness must join them. He then said that J. P. Parker, Jr., told him to tell witness that he, witness, had to go, and that if witness refused or "gave anything away," he, Parker, would kill witness. This was the first intimation the witness ever had that deceased was to be killed. He did not want to participate in the plot, and so informed defendant, but defendant replied that if witness refused, Jimmie Parker would kill him, witness. Thereupon the witness, being afraid to refuse, consented. The witness never at any time, before or after the killing, had any talk with the Parkers or anybody else about the killing. When witness, in view of the threat against his life, agreed to take part in the assassination, defendant told him that the agreement was to meet at a hill near Cedar Creek church about three-fourths of a mile from where the Parkers lived. The witness then left defendant and went to the point in the field where his two sons were burning brush, and after a while returned to defendant, ready to accompany him to the place of meeting, two and a half or three miles distant. The witness

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and the defendant left the witness's field about an hour before sun down, and walked to the place of meeting, the defendant taking a double barreled shot gun with him, but the witness had no arms of any character on his person. They arrived at the place of rendezvous about dusk, where, within a few minutes, they were joined by J. P. Parker, Henry Parker and Lewis Davis. The entire party then went to a hill north of the church, when J. P. Parker, Jr., said to defendant: "Well, you know where to go." Defendant answered: "Yes," and the party separated into two parties, the two Parkers and Davis going one way and witness and defendant another. Neither of the Parkers nor Davis spoke to witness on that night, nor did the witness see them again after separating from them as stated. The witness and defendant went direct to the place near Mrs. Hay's house where the shooting afterwards occurred. Defendant took his position behind a black jack tree, south of the road which, from its connection with the main Buffalo road, a few yards distant, leads to Linson's house. He then cut away some undergrowth that obstructed his view of the road. The witness stood about the tree, first on one side and then on the other. Defendant told witness that Linson, having deceased in charge, was to reach the cross road at about twelve o'clock, and was to apprise him, defendant, of their proximity, and would drop behind deceased just before reaching the junction of the roads, and would call to deceased to "turn to the right;" that Linson then was to ride far enough in the rear of deceased to enable him, defendant, to shoot and kill deceased. The witness and defendant were at the tree three hours or more before Linson and deceased reached the cross road. No person came along that road before the killing, except that Lewis Davis came to the tree once and left again. About twelve o'clock Linson and deceased reached the vicinity of the cross road, and Linson, who appeared to be behind deceased, exclaimed: "Turn to the right, Bob; we will go by my house." Deceased turned to the right into the said cross road, Linson dropped behind as agreed, and defendant fired two shots from his gun at deceased. Linson fired two shots and witness and defendant fled from the place through the woods, defendant dropping his hat in the flight.

The witness and the defendant went to the town of Buffalo on the Friday preceding the fatal Monday. They went into the store of J. M. Pearlstone & Son, and witness asked Mr. Owens,

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the clerk, for a sack that Dr. Balter was to leave there for him. He got the sack and directed Mr. Owens to put him up a dollar's worth each of coffee and sugar. While Mr. Owens was putting up the said articles the witness observed a box of black straw hats. He asked Owens to give him one of the hats. Owens gave him one and told him not to let the "boss" see him with it. Defendant then asked Owens to give him one of the hats, and Owens did so. Witness then put the two hats in the sack, and he and defendant got in the wagon and went home. When they went to separate that evening defendant thrust his arm in the sack to get his hat. He took out one of the hats, remarking: "It makes no difference which I take, as they are both alike."

Cross examined, the witness said that, during the week preceding this trial, he testified on the habeas corpus trial of J. P. Parker, Jr., Henry Parker and W. T. Linson, and on that trial he testified that he had not talked to anybody about the killing of deceased, and that he had been promised nothing in consideration of his testimony. As a matter of fact, before he testified on the said habeas corpus trial, and before he went before the grand jury to testify about the killing of deceased, he had a talk, in the front room of the jail, with District Attorney Campbell and Messrs. B. D. Dashiell and F. M. Etheredge. In that conversation District Attorney Campbell told witness that if he would truthfully tell all he knew about the killing of deceased he, Campbell, would not prosecute witness, and witness would escape punishment. The reason why witness testified untruthfully about this matter on the habeas corpus trial was that Mr. Campbell particularly admonished him, in the said conversation, not to divulge the agreement. Witness knew, when he made the false statement on the habeas corpus trial, that he was committing a moral and penal offense, and that he was making himself liable to prosecution for perjury. He did it, however, to comply with the instruction of the district attorney as he understood it, or, in the language of the witness, "I done it because the district attorney told me to say nothing about it." An indictment was still pending against the witness, in the district court of Freestone county, for an assault with intent to murder deceased, committed in the fall of 1887.

Miss Celia Pettigrew testified, for the defense, that, at the time of the assassination of the deceased, she was teaching school at Cedar Creek, near the residence of Mr. J. P. Parker,

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Jr., and at that time was boarding at the house of the said Parker, occupying a room with Mrs. B. Solomon. She had a distinct recollection of the fatal night, and knew as a matter of fact that J. P. Parker, Jr., was at home with his family on that night, at least until ten o'clock. The witness, Mrs. Solomon, J. P. Parker, Jr., and Mrs. Parker, his wife, sat on the gallery of said Parker's house, engaged in conversation, until about ten o'clock, when Mr and Mrs. Parker retired to their room. Witness and Mrs. Solomon went to their room a few minutes later. A negro girl reported the killing of deceased early on the next morning, Mr. J. P. Parker, Jr., being present, and repeated the current rumor that deceased's dying statement inculpated the Parkers. Witness then vividly recalled the presence of Mr. Parker at his home on the previous night. Witness was not related in any way to the parties involved in this prosecution. Mrs. B. Solomon corroborated the testimony of Miss Pettigrew, placing J. P. Parker, Jr., at home at dark on the fatal night, continuously until he retired with his wife about ten o'clock, and still at home at daybreak next morning.

The substance of the testimony of Mrs. H. C. Parker, the wife of J. P. Parker, Jr., was that her husband came home from work about sun down, ate supper with the witness, Mrs. Solomon and Miss Pettigrew about dark, engaged in conversation with the said parties on the gallery until about ten o'clock, then retired with the witness to their room, when he wrote until about eleven o'clock, when he went to bed with the witness, and remained in bed continuously until day break next morning. Mrs. Parker declared that she was constitutionally of a nervous temperament, easily awakened from sleep, and that her husband could not possibly have left their bed that night without awakening her, and that to her positive knowledge he did not leave it on that night.

The written testimony of Mrs. M. L. Parker, the wife of Henry Parker, as delivered on the habeas corpus trial of W. T. Linson et als., was read for the defense by agreement. The substance of her said testimony was her positive statement that her husband was at his home throughout the entire night of the fatal Monday.

J. C. Collins, George Collins and J. T. Windham testified, for the defense, that they were at Jesse Cowart's stock pen on May 1, 1888, when defendant, James, Ed and George Smith. J. P. and Henry Parker and Lewis Davis came there to look through

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Martin's herd of cattle, and that J. P. Parker, Jr., and defendant were the only persons who then had guns.

Dotson & Richardson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. With respect to the testimony admitted as res gestæ, it is not shown by the bill of exception what particular objection was made thereto. A bill of exception to the admission of evidence should clearly disclose the ground or grounds of the objection made to the evidence; otherwise it is not entitled to be considered. (Willson's Crim. Stats., sec. 2516.)

With respect to the admission of the testimony of dying declarations made by the deceased, the bill of exceptions is defective in the same particular mentioned above. It does not state the ground or grounds of objection made thereto.

No exceptions were made to the charge of the court. We have carefully examined the charge in the light of the objections made to it on the motion for new trial and in this court, and, in our opinion, it is free from material error—such error as might have injured the rights of the defendant. It may be that in some particulars the charge is not critically correct, but, considered as a whole, and with reference to the evidence, it is not materially objectionable.

We think the evidence amply supports the conviction. The testimony of the accomplice witness Smith is strongly corroborated by evidence which tends to connect the defendant with the crime. Without the testimony of the accomplice witness the guilt of the defendant is sufficiently established by the other evidence.

We have found no error in the conviction, and the judgment is affirmed.

Affirmed.

Opinion delivered January 26, 1889.

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No. 2638.

FRANK JOHNSON v. THE STATE.

PRACTICE—EVIDENCE—WITNESS.—The husband or wife is competent to testify for the other in a criminal prosecution, but not for the State, unless the prosecution be for an offense committed by the one against the other. This rule is not relaxed by a mere separation of the spouses without a legal severance of the marriage relation.

APPEAL from the County Court of Brazos. Tried below before the Hon. D. C. Barmore, County Judge.

The conviction in this case was for an aggravated assault upon Sally King, a female, the penalty assessed being a fine of twenty-five dollars.

The question determined on this appeal does not require a statement of the proof.

J. A. Buckholts, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant was tried and convicted in the lower court for aggravated assault upon one Sally King. Sally King was appellant's step-daughter. Over objections of defendant, his wife, who was the mother of the injured party, was introduced as a witness by the prosecution and allowed to testify against him, as shown by his bill of exceptions.

A husband or wife may, in all criminal actions, be witnesses for each other, but they are expressly prohibited by statute from being witnesses against each other, except in prosecutions for offenses committed by the one against the other. (Penal Code, art. 735; Compton v. The State, 13 Texas Ct. App., 271; Thomas v. The State, 14 Texas Ct. App., 70.)

It is shown by the testimony of the wife that she left her husband on the day of the alleged assault upon her daughter; that she had not returned to or cohabited with him since, and that she did not intend to live with him again. Such conduct on her part, however, did not operate a dissolution of the mar-

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riage, or so alter the relations of the parties in contemplation of law as to render her a competent witness in the case against the husband. (Clanton v. The State, 20 Texas Ct. App., 615; Johnson v. The State, Id., 609.)

The Assistant Attorney General confesses error on behalf of the State in the ruling of the court in admitting the wife to testify, and the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 26, 1889.

No. 2636.

CHARLES H. FRANKLIN *v.* THE STATE.

ASSAULT AND BATTERY—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction for assault and battery.

APPEAL from the County Court of Leon. Tried below before the Hon. H. B. Pruitt, County Judge.

The conviction was for an assault and battery upon Sam H. Winn, and the penalty assessed against the appellant was a fine of five dollars.

Sam H. Winn testified, for the State, that he was a deputy sheriff of Leon county, located at the town of Marquez. On the night of August 13, 1887, the witness and Mr. Yancy Burns went to the depot in Marquez to meet a lady passenger who was due on the incoming train. Witness reached the depot a few steps in advance of Burns, Campbell LaFlore and others, just as the train pulled in, and became separated from them by the said train. While the passengers were getting off the train for supper, some person on the other side of the train from witness called to him that a fight was in progress. Witness went at once to the other side of the train, and found LaFlore engaged in a fight with defendant. LaFlore was on his hands and knees, endeavoring to get away from defendant, who was striking him with a plank. Witness went up to defendant, told

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Statement of the case.

defendant that he was an officer, and would have to arrest him. Defendant replied: "By God (or God d—n), I will see that you don't." Witness then seized the defendant, and in the struggle that ensued defendant struck him, witness, with his fist and with a plank. He finally broke loose from witness, seized witness by the collar and struck him over the head with a piece of wood. Witness had no weapon when he undertook to arrest defendant, but, when defendant struck witness with the piece of plank and knocked him back a step or two, some person called to witness: "Get your pistol." Defendant said: "Let me get mine, too."

Continuing, this witness said that he did not know how the fight between defendant and La Flore began. He did not then know the defendant, and did not suppose the defendant knew him. After the occurrence described the defendant got back on the train, and witness followed and arrested him, the defendant making no resistance. Having arrested defendant, the witness put a chain on his legs and tied his hands behind him, and then took him to town, where Justice of the Peace Watson proceeded to investigate the complaint filed against him. While that investigation was in progress some person from behind the witness struck the defendant a severe blow with a heavy weight that belonged to a platform scales. Defendant was still tied when struck by the scales weight. Witness had to go home after the investigation, and, not desiring to take defendant with him, he turned him over to a negro named Ephraim Malone, and directed Malone to take defendant out of town for the night in order to prevent the defendant being further hurt.

Mrs. Lock testified, for the defense, that she was a passenger on the train that stopped for supper at Marquez on the night of August 13, 1887. Defendant was the porter on the train. As the train slowed up at Marquez the defendant appeared at the door of the ladies' coach and announced the supper station. While the passengers were getting off the witness heard a noise outside. Looking out of the car window, the witness saw three or four men beating the defendant with sticks, defendant being down on his hands and knees. The defendant presently made his escape and ran around the train, pursued by the men.

S. P. Cocherane, conductor on the train, testified, for the defense, that when the train stopped at Marquez for supper on the night of August 13, 1887, the defendant, in the discharge of

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his duties, got off the train, and, with the foot box in his hand, took his position at the steps of the ladies' coach to assist passengers desiring supper to get off. About that time a man, whose name witness had since learned to be La Flore, crowded up to the steps, when the defendant said to him: "Don't push me down." Thereupon La Flore kicked the defendant on the jaw. Thereupon the fight became general, three other men joining La Flore in beating defendant, one of them being Winn, who, as witness afterwards learned, was a deputy sheriff. The witness attempted to quell the riot, when one of the defendant's antagonists struck him, witness, above the eye with a coal cinder, and La Flore seized a heavy piece of iron pipe, three or four feet long, and "punched" at witness. About that time the defendant escaped and went back into a car. He was soon followed and arrested by Winn and a posse.

George Hughey, the paper vendor on the train, testified, for the defense, substantially as did the witness Cocherane. He heard some person, during the fight, call to Winn to get his pistol. Defendant said: "Let me get mine, too," and fled into the car where witness was, and asked the witness for his valise, which contained his pistol. Witness, who had hidden the valise, prevailed on the defendant to abandon the row and remain in the coach. Presently Winn and his posse came in and arrested defendant, at which time defendant stated to them that if he had known Winn to be an officer he would have surrendered to him. Defendant did not resist arrest by Winn and the posse.

Ephraim Malone was next introduced by the defense. He sought to be excused from testifying, and finally declined to testify upon the ground that he was afraid if he testified to facts in his knowledge he would suffer at the hands of Winn, La Flore, or their friends. Compelled by the court to answer questions, he stated that he was present at the examination of the defendant before Esquire Watson on the night of the fight. While defendant, chained and tied, was being examined La Flore struck him once with his fist and afterwards with a scales weight. Winn afterwards turned defendant over to witness, and directed witness to keep him away from town that night as he might get hurt. Witness took the defendant to the woods and kept him until next morning.

Dotson & Richardson, for the appellant.

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Opinion of the court.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. On the evidence as it is presented in the record before us, we do not think the conviction in this case should be permitted to stand. Appellant was assaulted by one LaFlore; others engaged in the affray, assisting LaFlore, and were beating appellant when Winn, who was a deputy sheriff, and who is the party charged to have been assaulted, ran around the train of cars, and, without attempting to arrest any of the parties fighting the appellant, grabbed hold of appellant, and appellant struck him—so he testifies. Other witnesses testify that Winn himself entered into the fight and commenced striking appellant with a board or "doty piece of plank." Winn testifies that when he arrived at the scene of conflict he told the defendant he was an officer, and would have to arrest him. "Defendant remarked: 'By God (or God d—n), I will see that you don't.' I grabbed defendant, and during the scuffle we had, he struck me with his fist and a plank." No other witness heard Winn tell the defendant that he was an officer and would have to arrest him. Defendant's own statement after the fight, and which was introduced in evidence, was that if he "had known Mr. Winn was an officer during the fight, he would have surrendered to him."

Now, if appellant, engaged in a serious fight with several other parties, was grabbed by Winn, and, not knowing that Winn was an officer, struck Winn in resistance to what reasonably might appear to him as an assault by Winn upon him, it is clear that he would be justifiable on the ground of self defense. If Winn was an officer really intending to quell the difficulty and preserve the peace, it does appear to us as if he made a most serious mistake in accomplishing that object by grabbing hold of the man who was contending, single handed, against three or four others. And it is but reasonable to suppose that under such circumstances defendant might well have mistaken Winn for "another Richmond in the field," come to swell the ranks and take part with his assailants. If he acted upon such reasonable appearances, then he was only exercising his inalienable right of self defense, and should not be punished for doing so.

We do not deem it necessary to discuss the outrages committed upon defendant after his arrest, as disclosed in the record. Suffice it to say, we do not believe from the evidence that de-

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fendant's guilt is made so clear and certain, under all the circumstances of this case, as that his conviction should be permitted to stand as a precedent.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 26, 1889.

No. 2547.

JAMES HANSON v. THE STATE.

1. THEFT — EVIDENCE — ACCOMPLICE TESTIMONY. — OWNERSHIP, like every other material issue on a trial for theft, must be proved by competent evidence, and if it rests upon the testimony of an accomplice such proof is insufficient unless legally corroborated.
2. SAME — FACT CASE. — See the statement of the case for the substance of evidence *held* insufficient to support a conviction for theft.

APPEAL from the District Court of Kimble. Tried below before the Hon. A. W. Moursund.

This conviction was for the theft of a cow, the property of L. P. Dodson. The penalty assessed by the verdict was a term two years in the penitentiary.

J. J. Stockbridge was the first witness for the State. He testified, in substance, that he was in the employ of one Bybee, in Kimble county, on the first day of April, 1887. On the morning of that day, the defendant, armed with Bybee's gun, rode up to Bybee's camp, and Bybee asked him if he had "found that beef." Defendant replied that he had found one that would do, and asked Bybee if he would go and help kill it. Bybee sent the witness in his stead. Defendant piloted witness to a certain point and indicated a certain red cow, and directed witness to drive her to a point where he could shoot her. Witness did so, and defendant fired upon and killed the cow. Witness helped him but little in skinning the cow. Defendant then cut off the two hind quarters of the beef and put them on his horse. He then cut off the ears, which he put in his coat pocket. He then cut into strips those parts of the hide on which the brands were placed. Then he went to camp

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Statement of the case.

with the two hind quarters, leaving the balance of the beef and the remainder of the hide. Some of that beef was eaten at supper that night by the witness, defendant and others. The animal was branded DOD on one side and SON on the other. On the morning after killing the cow, witness and defendant cut some of the beef into strips and hung it up to dry.

On his cross examination this witness said that soon after the killing of this cow, the sheriff took possession of the horses which witness was then herding for Bybee. Bybee escaped arrest. Witness was not placed under arrest by the sheriff, but at the sheriff's request he assisted in driving the horses to Junction City. On his arrival at Junction City he made an affidavit charging defendant with the theft of the cow. He did not then know who owned the cow or the brand described, nor did he then know that defendant was not authorized to kill the said cow. Witness suspected nothing wrong about the killing of the cow until defendant cut off the ears. He would have helped skin the cow had his knife been sharp enough, and would have helped take the meat to camp had his horse been gentle enough. Witness did not, while at defendant's camp, cut fresh raw hide into hopples or neck strips for Bybee's horses, of which he then had charge.

L. P. Dodson testified, for the State, that his wife owned the DOD—SON brand of cattle, but they were in the exclusive care, control and management of witness. He had no recollection of missing any particular animal in the spring of 1887, but he never gave his consent to defendant to take or kill any of that stock.

Deputy Sheriff Oliver testified, for the State, that he was at defendant's camp a day or two after the alleged theft, and saw the hind quarter and part of another hind quarter of a beef in that camp. Some strips of fresh beef were hanging up to dry. He also saw in that camp some strips of fresh cow hide, red in color. The strips were of a size usually used for hopples. At a point near the said camp witness and one Brown found two men in charge of a bunch of horses. One of the men fled, and witness took charge of the horses as stolen property. The witness Stockbridge, who was the other man with the herd, helped witness to drive the horses to Junction City. He was not placed in arrest. On the way to Junction City, Stockbridge told witness about the defendant killing the DOD—SON cow.

The State closed.

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J. J. Stockbridge was recalled by defendant as his first witness. He denied that, two or three months after the alleged theft, he met Allen Hanson and Ed Dunn near his, witness's, father's house, in Comanche county, and told them that he got into trouble about some horses that were found in possession of himself and Bybee, near defendant's camp in Kimble county, and that, to save himself from prosecution and conviction for complicity in the theft of those horses, he was compelled to file an affidavit charging defendant with the theft of Dodson's cow.

Allen Hanson and Ed Dunn, testifying for the defense, deposed that the State's witness Stockbridge did, in Comanche county, near the house of his, Stockbridge's, father, tell them that two or three months previously he and Bybee were discovered by officers, near defendant's camp, in possession of a herd of stolen horses; that Bybee escaped, and that, to save himself from prosecution for the theft of those horses, he was compelled to file the affidavit charging defendant with the theft of Dodson's cow.

A. D. McGinnis, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for theft of a cow, the alleged property of L. P. Dodson. Upon the trial the State introduced as a witness one Stockbridge, who was evidently an accomplice. He swore to facts which very cogently criminated the defendant, but, being an accomplice, was he sufficiently corroborated?

The cow was alleged to be the property of L. P. Dodson. There is not the slightest testimony in this record, save that of Stockbridge, which tends to prove that the animal belonged to Dodson, or that Dodson had lost or missed the cow. Upon the issue of ownership the accomplice must be corroborated. (Croell v. The State, 24 Texas Ct. App., 404.)

Again, that the accused stole the cow of any person is shown only by the testimony of Stockbridge, the accomplice. He states that defendant carried the beef and part of the hide to his camp; that the cow was red, etc.; that she was killed about April 1; that defendant hung up the meat to dry, etc.

Deputy Sheriff Oliver was at the camp of defendant about

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the last of March or first of April, and saw fresh beef and some strips of hide, and also some beef hung up to dry. He also saw some fresh raw hide (red) cut up in strips of suitable size for hopples. The testimony of Oliver constitutes the supposed corroboration. Now let us eliminate from the case the evidence of Stockbridge. What fact is there in the evidence of Oliver which would induce a reasonable person to infer that defendant had stolen the beef? At his camp was found a hind quarter and other portions of a beef. This meat was fresh. Some was hung up to dry. The hide of the animal was red. Some of the hide was cut up in strips of suitable size for hopples. Is this evidence tending to show that Dodson's animal was stolen and that defendant was connected with the theft? We think not.

Appellant reserved no bill of exceptions to the action of the court in overruling his application for a continuance.

Because the witness Stockbridge was not corroborated as to the ownership of the animal, and because he was not corroborated as to the theft by appellant of any person's animal, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 30, 1889

No. 2548.

GABE DAY v. THE STATE.

1. GAMING—INDICTMENT.—It is not essential to the sufficiency of an indictment to charge the offense of betting at a game played with dice, that it shall allege that the accused played the game with another or bet with another person.

2. SAME—BETTING AT A GAME PLAYED WITH DICE—DISTINCT AND CONTINUOUS OFFENSES.—To bet at any game played with dice, by whatever name the game be known, is an offense under the law of this State. And each separate act of betting at such a game constitutes a distinct offense. The consecutive throwing of dice from nightfall until day break does not constitute a continuous game, and the consecutive betting on the different throws does not constitute a continuous offense.

3. SAME—EVIDENCE—ACCOMPLICE—WITNESS.—A witness, to be incompetent to testify in behalf of a defendant upon the ground that he was

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under indictment for the same offense, must appear to have been indicted for participation in the very same criminal act for which the defendant is being tried. It will not suffice to disqualify him that he is indicted for a similar offense. The defense in this case offered a witness by whom to prove an alibi. The witness was rejected, upon the State's motion, upon the ground that he was charged by a separate indictment with the same offense. The onus of establishing incompetency by showing that the indictment against the witness covered the same criminal act for which the defendant was on trial rested on the State; and, the State failing to establish that fact in this case, the presumption obtained in favor of the competency of the witness, and the ruling of the court was error.

APPEAL from the County Court of Freestone. Tried below before the Hon. T. W. Sims, County Judge.

The opinion discloses the nature of the case, and the record brings up no statement of facts.

The penalty assessed was a fine of ten dollars.

No brief for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for betting at a game played with dice, called "craps." The indictment fails to allege that appellant played the game with another or bet with another person. This is not necessary to its sufficiency, but is material with respect to another question.

Upon the trial defendant offered to prove an alibi by Robert Cooper and others. The State objected because they were in a separate bill or bills indicted for betting at craps. The evidence upon this matter was that the game on the night of August 24, 1888, began about dark and continued until daylight the next morning, and that Cooper and the others during the night participated in the betting at the game called craps. Now, it will be observed that it is not shown that the proposed witness bet with defendant or at the game at the same time that defendant bet or played.

Looking to the definition of the offense, we will find that to bet at any game that can be played with dice is an offense. Let the game be called by whatever name it may be, or without a name, if played with dice, and a person bets at it—that is, on

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the result, he would be guilty of an offense. It is seen that this is not a continuous offense, but one bet at this game and the offense is complete.

Article 731, Code Criminal Procedure, provides that persons charged as principals, accomplices or accessories, whether in the same indictment or different indictments, can not be introduced as witnesses for one another. The proper rendering of the article is that persons charged as principals to the same offense, or accomplices or accessories to the same offense, either in the same indictment or in different indictments, can not be witnesses for one another. An offense is an act or omission forbidden by positive law, to which is annexed, on conviction, any punishment prescribed in this code. (Art. 52, Penal Code.) In this case the prohibited act is betting at a game played with dice. Now, to render incompetent, the witness must be indicted as principal, accomplice or accessory to the same act for which defendant is indicted. The transaction must be the same; a similar act will not suffice.

To illustrate: A game of poker begins at dark and the playing is continued all night. During the night a number of persons participate in the game, but not with each other or at the same time. Now, if one should be indicted, those who did not play with him, or play at the game at the same time at which defendant played or bet, would not be incompetent.

Appellant proposed to prove a material fact by several witnesses; the State objected upon the ground that the proposed witnesses were incompetent. The presumption being in favor of competency, the State must show incompetency. This was not done in this case.

But it is urged that these witnesses could not be compelled to criminate themselves. That was a matter with them, and not the State. Nor was this a necessary or probable result; for they could have sworn to the facts sought to be elicited without self crimination, though they may have been guilty themselves of the same offense as that charged against appellant.

Under the facts as presented in the record, we are of opinion that the court erred in holding these witnesses incompetent.

The judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

Opinion delivered January 30, 1889

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Syllabus.

No. 2445.

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DAVE FAHEY *v.* THE STATE.

1. CONSTITUTIONAL LAW—OCCUPATION TAX ON RETAILING LIQUORS.—Under the Acts of March 11, 1881, and April 4, 1881, the appellant was prosecuted for pursuing the occupation of selling liquors in quantities less than a quart, without paying the tax required by law and without license, etc. He excepted to the indictment on the ground that the said Acts of 1881 are violative of the Constitution of the State in two respects; first, because they contain more than one subject, and embrace subjects not expressed in their titles; and, second, because, as a condition precedent to engaging in such business, the said Acts require the tax thereon to be paid in advance for the term of a year, but permit the tax on other occupations to be paid quarterly, and require a license to pursue said business, but permit others to be pursued without a license, and therefore are repugnant to the constitutional requirement of equality and uniformity in taxation. But *held* that neither of these objections to the said Acts of 1881 is tenable, nor are the said Acts repugnant to the Fourteenth Amendment of the Constitution of the United States. See the opinion in extenso for a lucid exposition of the principles and precedents which maintain the constitutionality of the said enactments.

2. SAME—"SUBJECT" OF LEGISLATIVE ACTS.—The present Constitution of Texas provides that "No bill (except general appropriation bills, etc.,) shall contain more than one subject, which shall be expressed in its title." *Held* that an Act may, without contravening this inhibition, contain or contemplate more objects than one.

3. EQUALITY AND UNIFORMITY OF OCCUPATION TAX.—Section 1 of article 8 of the State Constitution expressly empowers the Legislature to impose occupation taxes, and section 2 of the same article requires that such taxes shall "be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." These provisions do not necessitate equality and uniformity as between different classes of occupations, nor require the imposition upon every class of the same conditions precedent to their lawful pursuit; and therefore the requirement from retail liquor dealers of a license and of prepayment of the tax for a year does not contravene the said constitutional provisions, though these conditions be not imposed upon other occupations. So, also, one county may, without infringing said provisions, levy a larger county tax upon an occupation than is levied on the same occupation by other counties.

4. CHARGE OF THE COURT.—The trial court instructed the jury to convict in case they found that the defendant (within the alleged venue and dates) pursued the occupation of selling spirituous, vinous and malt liquors, in quantities less than a quart, "without having paid the

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Statement of the case.

occupation tax of three hundred dollars to the State and one hundred and fifty dollars to the county of Galveston, and the said taxes were then due and owing and unpaid to the State and county respectively;' and further instructed the jury that the penalty was by a fine of not less than four hundred and fifty dollars, nor more than nine hundred dollars. Appellant assails these instructions because they substitute the phrase "without having paid the tax" in lieu of the phrase "without having obtained a license." *Held* that the substitution was to appellant's advantage, and affords him no cause for complaint.

5. SAME.—It was also objected that the instructions assumed as a fact that the county of Galveston had levied on the appellant's occupation a county tax of one half the tax levied on it by the State. The record, however, shows that the appellant admitted that fact on the trial, and that the State consequently introduced no other proof of it. *Held* that the objection is not tenable.

6. SAME—PENALTY.—Objection was taken to the penalty as stated in the instructions, viz: a fine of not less than four hundred and fifty dollars nor more than nine hundred dollars. *Held* that the instruction was correct, inasmuch as the State tax was three hundred dollars and the county tax one hundred and fifty dollars, aggregating four hundred and fifty dollars, which was the minimum and the double of which was the maximum of the fine prescribed by the statute.

APPEAL from the Criminal District Court of Galveston. Tried below before the Hon. Gustave Cook.

By indictment it was charged that, in the county of Galveston, on January 18, 1887, the appellant "unlawfully and wilfully did pursue and follow the occupation of selling spirituous, vinous and malt liquors in quantities less than one quart, and did then and there sell spirituous, vinous and malt liquors to persons whose names are to the jurors unknown (the same being an act taxed by law), without first having obtained a license therefor; and that the said Dave Fahey has not paid tax or obtained a tax receipt or license therefor; and that said Dave Fahey is indebted to the State of Texas in the sum of three hundred dollars, occupation tax for pursuing said occupation, and to the said county in the sum of one hundred and fifty dollars, occupation tax for pursuing said occupation, and that the commissioners court of Galveston county levied a tax on said occupation, one half the amount levied by the State on said occupation; contrary," etc.

In the opinion of this court will be found the exceptions taken by the defense to the indictment, and also the exceptions taken to the instructions given to the jury by the trial court.

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Argument for the appellant.

The inculpatory testimony was conclusive and unquestioned, and there is no occasion to set it out here. The jury assessed the punishment at a fine of four hundred and fifty dollars. The printed arguments of counsel for both sides of this case are characterized by much research and ability, but are so elaborate that space can be allowed for no more than the leading propositions and the corresponding citations.

Gresham, Jones & Spencer, for the appellant: The court erred in not quashing the indictment,

1. Because the laws of March 11, 1881, and April 4, 1881, levying the occupation tax and providing for the issuance of a license is unconstitutional and void, in this, that said acts contain more than one subject, to wit, the exercise of the police power and that of taxation for general revenue, and embrace subjects not expressed in the titles of the bills. (Gen. Laws, 1881, pp. 21–112; Const., art. 3, sec. 35; Const., art. 8, sec. 1; Ex Parte Mabry, 5 Texas Ct. App., 98; Cannon v. Hemphill, 7 Texas, 207; San Antonio v. Gould, 34 Texas, 49; Giddings v. San Antonio, 47 Texas, 548; State ex re. Jones v. Lancaster Co., 6 Neb., 474; State v. McCann, 4 Lea, 1; State ex re. Drury v. Halleck, 12 Pac. Rep., 832; Skinner v. Wilhelm, 6 West Rep., 367; Boom Co. v. Prince, 24 N. W., 361; S. C., 10 Am. & Eng. Corp. Cases, 391; Reader v. Township of Union, 39 N. J., 509; People ex re. Stewart v. Father Math. Soc., 41 Mich., 67; State v. Bowers, 14 Ind., 195; Igoe v. State, 14 Ind., 239; Grubbs v. State, 24 Ind., 295; Rogers v. Manf. Imp. Co. 1 Cent. R., 144; Lane v. State, 8 Cent. R., 639; Dorsey's Appeal, 72 Pa. St., 192; Ragio v. State, 6 S. W. R., 401; Matter of Sockett, 74 N. Y., 95; Walker v. State, 49 Ala., 329; Ex Parte Thomason, 20 N. W. R., 312; Peck v. San Antonio, 51 Texas, 490.)

Said acts are unconstitutional in this, that they require the said payment of the tax to the State, county and city, in advance, for the term of one year, as a condition precedent to the right of pursuing said occupation, while all others are permitted to pay quarterly; and is in conflict with and repugnant to sections 13 and 19, Bill of Rights, and to sections 2 and 3, article 8, of the State Constitution, and the fourteenth amendment to the Constitution of the United States; and they are inimical to the Constitution in this, that they require a license of persons pursuing the occupation of the appellant and of the billiard table keeper, and require none of persons pursuing any of the

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Argument for the appellant.

other occupations taxed by law, and provide no means of obtaining a license by such other persons. (Wharton's Com., sec. 13; 1 Kent's Com., 460; Cooley's Const. Lim., 391; Ex parte Westerfield, 55 Col., 550; The State v. Hammer, 42 N. J., L., 435; Com. v. Pottan, 88 Penn. State., 258; Stein v. Foltz, 5 Central Rep., Penn., 283; The State v. Board of License, 4 Central Rep., N. Y., 83; Ragio v. The State, 6 S. W. Rep., 401; Morrison v. Buchert, 3 Central Rep., 117; The State v. Anderson, 3 Western Rep., Ohio, 605; City of Scranton v. Silkman, 4 Central Rep., 317; Bank of State v. Cooper, 2 Yerg., 599; Wally v. Kennedy, 3 Yerg., 555; The State v. Duffy, 7 Nev., 342; Slaughter House Cases, 16 Wall., 67.)

The indictment is defective in not alleging that the defendant had not procured a license before the finding of the indictment; and it also fails to state in what quantities the defendant sold the liquor. (Penal Code, art. 112.)

The sixth and seventh assignments of error call in question the correctness of the charge of the court. The court gave the following charge: "If the evidence satisfies the jury beyond a reasonable doubt that the defendant did, as charged in the indictment, pursue, in the county of Galveston, State of Texas, the occupation of selling spirituous, vinous and malt liquors in quantities less than a quart, between the first day of October, 1886, and the filing of the indictment in this case, to wit: the twenty-fourth day of January, 1887, without having paid the occupation tax of three hundred dollars to the State and one hundred and fifty dollars to the county of Galveston, and that said tax was then due, owing and unpaid to the State and county respectively—say you find the defendant guilty as charged in the indictment, and assess the punishment, which is a fine not less than four hundred and fifty dollars nor more than nine hundred dollars."

It is rare to find in so short a charge so many errors.

First. The offense denounced is not the selling of spirituous, vinous and malt liquors without first paying the tax; but without first obtaining a license therefor. (Lewis v. The State, 14 Texas Ct. App., 232; Penal Code, art. 110.)

Second. The court charged that if the defendant pursued the occupation between the first of October, 1886, and the twenty-fourth of January, 1887, and the tax was "then due, owing and unpaid," he must be found guilty; when the charge on this point should have been: "and the tax was due, owing

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and unpaid on the twenty fourth of January, 1887," and defendant had obtained no license, find him guilty, etc. (Penal Code, art. 112.)

The court also erred in charging upon the weight of the evidence, as follows: "without having paid the occupation tax of three hundred dollars to the State and one hundred and fifty dollars to the county of Galveston * * * say you find the defendant guilty as charged in the indictment, and assess the punishment, which is a fine not less than four hundred and fifty dollars nor more than nine hundred dollars."

The amount of tax as levied by the county, if any, was a question of fact that the court could not take judicial knowledge of nor assume as a fact proven. The charge should have been: "If the jury believe from the evidence that the defendant did pursue the occupation without having first obtained a license, you will find him guilty and assess the penalty, which is a fine in any sum not less than the amount of the tax so due on January 24, 1887, if any, and not more than double that sum." (Penal Code, art. 112.)

The court also erred in adding the amount alleged to be due the county to the penalty, because that part of the penalty is not affixed to the offense by any written law of this State. To hold otherwise is to make the act a special law and unconstitutional. To illustrate: A person committing the offense in Brown county (supposing said county to have levied no occupation tax) would be punished by a fine of not less than three hundred dollars, nor more than six hundred dollars; if in Galveston county not less than four hundred and fifty dollars nor more than nine hundred; if in Galveston city and county not less than six hundred nor more than twelve hundred; and all for identically the same act of the defendant. (Penal Code, art. 3.)

The court should have granted a new trial because the offense charged in the indictment is for pursuing the occupation of selling spirituous, vinous and malt liquors in quantities less than a quart, without first having obtained a license therefor. The verdict and judgment are for pursuing the occupation of selling spirituous, vinous and malt liquors without license or without having paid the tax due.

W. L. Davidson, Assistant Attorney General, for the State: Appellant moved to quash the indictment in the court below,

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and the motion was overruled. He assigns error on this ruling of the trial court.

1, Because the laws of March 11, 1881, and April 4, 1881, levying the occupation tax, and providing for the issuance of a license, are unconstitutional and void; in this, that said acts contain more than one subject, to wit, the exercise of the police power and that of taxation for general revenue, and embrace subjects not expressed in the titles of the bills.

The above stated proposition of appellants is based upon the anterior propositions: 1, That the taxing power of the legislative body is a separate and distinct power from that of police regulation; 2, that, being separate powers, their domain and limits are so sharply defined and marked that the one can not be called to aid the other by the Legislature in exercising the inherent sovereignty lodged in that body in matters of taxation and police regulations, and that in no emergency can the one be used as the adjunct to the other in collecting the assessed revenues of the State; 3, that no act of the Legislature can embrace matters not expressly set out in the title.

It may be admitted as a general proposition that the taxing power is a separate power from that of police regulation, and equally so is the right of eminent domain. They have, as a general rule, a different operation, pursue a different channel, and attain different ends. However distinct their power and authority may be, and however wide they may diverge when considered as questions of inherent sovereignty, yet they have the same origin and spring from the same source. All the authorities agree that the right of eminent domain, the taxing power, the police regulation, all have their origin in and spring from necessity. All endorse the doctrine that the above enumerated powers are the strongest evidences of state sovereignty, and lie back of all law, organic or statutory. All the authorities agree that these powers are unlimited in the Legislature, unless specially curtailed by the express provisions of the Constitution. It is a proposition not to be doubted that the Legislature have the authority inherent to exercise proper legislation with reference to eminent domain, to levy taxes and provide for the collection of the same, both on property and professions, pursuits and occupations, subject only to constitutional restrictions. It is equally certain that the "necessity" is to be judged of by the Legislature, and that their action is final, unless in plain, clear, and unequivocal terms that action

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is contrary to constitutional limitations. (Tiedeman, Lim. on Police Power, pp. 371-378; Id., pp. 1-4; Id., pp. 461-482; also 467-471; Potter's Dwarris on Stat. and Cons., pp. 444-467; Cooley, Con. Lim., pp. 598, 673-676; Cooley on Taxation, pp. 1, 4, 384, 512.)

Article 8 of the Constitution of 1876 does not affect this prerogative, nor alter this authority, except as therein set out. The exemptions therein set out do not touch the question at issue, nor apply thereto. The limitations mentioned in that article of our Constitution, and exemptions therein specified, are (1) mechanical and agricultural pursuits, and (2) that cities, towns and counties can only levy one-half of State tax on occupations; (3) it also requires taxation to be uniform. This is fundamental any way in a free government.

Upon the question as presented the Constitution says the Legislature may levy occupation taxes. This neither adds to nor detracts from the inherent power of the Legislature to levy taxes upon occupations. It is not a limitation upon legislative authority. When the Constitution does not limit the power to tax, the Legislature can not be controlled in this respect by any co-ordinate branch or department of the government, because it is independent of the other departments, and in this matter is supreme. I speak only of State governments and sovereignties.

Is a State law levying an occupation tax, and requiring a license to be procured before pursuing that occupation, void and unconstitutional because said law invokes the taxing and police power at the same time and in the same law?

The constitutionality of a law is presumed; and, as a conflict between the Constitution and the statute is not to be implied, it follows "that the court, if possible, must give the statute such a construction as will enable it to have effect." (Cooley's Con. Lim., side p. 183; Ex Parte Mabry, 5 Texas Ct. App., 98; Newland v. March, 29 Ill., 384.)

As our Constitution does not limit the Legislature in levying occupation taxes, it would follow that the tax complained of is properly levied, and is not subject to criticism from this standpoint. (Texas Con., 1876, art. 8; Cooley's Con. Lim., 598; Cooley on Tax., 84.)

"Necessity" is the common source of the taxing power as well as of police regulation. It would follow that no arbitrary rule can be laid down that will or can make them antagonistic to each

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Argument for the state.

other; and it would follow that, being grounded in necessity and in the inherent power of government, they can and are often called to aid and assist each other. Then, when relegated to fundamental laws of inherent authority, complete sovereignty of the Legislature, and the underlying law of necessity and self preservation, and not being abridged by the Constitution of these powers, it would follow that, having their origin in these common sources, the taxing power and police authority can not be arbitrarily separated, or be made to stand out opposed to each other by judicial construction or decision.

The position assumed by appellant in his able brief is that these two great powers are antagonistic and can not be called to the aid of each other—that is, that the Legislature can levy the tax by virtue of its taxing power, but that it can not call into requisition the police authority to enforce the collection of that tax by virtue of the same act of the Legislature. In other words, that an act of the Legislature that sought to enforce the collection of the tax levied by that act, by requiring the license to be procured before following that occupation, would be void as antagonistic to article 3, section 35, of the State Constitution, and that in no emergency can the Legislature blend the taxing and police power, because it would be obnoxious to said article and section of the Constitution. This idea is fundamentally wrong. (Cooley on Tax., 66; Lane Co. v. Oregon, 7 Wall., 71; State v. Parker, 32 N. Y., 426; Eyre v. Jacob, 14 Gratt., 422; Davey v. Galveston County, 45 Texas, 291; Ex Parte Cooper, 3 Texas Ct. App., 489; Ex Parte Mabry, 5 Texas Ct. App., 93; Willson's Crim. Stats., sec. 195; Cooley on Tax., 385; License Tax Cases, 5 Wall., 472.)

In speaking of taxes, their nature and kinds, Mr. Cooley says: "They may be intended to discourage trades and occupations which may be useful and important when carried on by a few persons under stringent regulations, but exceedingly mischievous when thrown open to the general public and engaged in by many persons. An example is the heavy tax imposed in some States and in some localities of other States on those who engage in the manufacture or sale of intoxicating drinks. Two purposes are generally had in view in imposing such a tax: to limit the business to a few persons, in order to more efficient and perfect regulation, and also to produce a revenue. A tax laid for the double purpose of regulation and

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revenue must be grounded in both police and the taxing power." (Cooley on Taxation, p. 11.)

Thus it will be seen that in almost all phases of taxation and police regulation the one is aid to the other. If one is the leading object, the other is made to assist in attaining it. In many matters the two powers seem to blend naturally and are often necessary adjuncts to each other. It would seem that it is immaterial which is the leading object.

This same question seems to be not a novel one in this State. Nearly every tax law passed since the organization of our State government has been attacked on the same ground—that is, that the law has two objects or subjects expressed in the title, and other matters in the body of the bill not mentioned in the title. Our Supreme Court thus speaks of it: "It is also insisted that the act is unconstitutional because it embraces two objects, both of which are expressed in its title. The number of cases in which the court has been called upon to consider similar objections to other laws renders it unnecessary to say little more than that this objection can not be maintained. The act embraces, as we think, but one leading object. All its provisions are subsidiary to, and legitimately connected with, and tend to effect and enforce this main object, which is sufficiently, clearly and definitely expressed in the title. The constitutionality of the act, as we have just said, was directly before the court shortly after its enactment; and the fact that no objection of this kind was then made to it by counsel or the court, and that it has been ever since recognized as a valid and constitutional enactment, is strongly persuasive that the objection is without force. Legislation of a similar character, both in respect to the title and the subject matter of the act, has, it is believed, been of frequent occurrence; and it has been too long recognized and enforced to be lightly set aside or annulled by the courts." (Davey v. Galveston County, 45 Texas, 298.)

"It can not be denied that appellant was engaged in an occupation for the pursuing of which he might be required by law to procure a license, and upon which an occupation tax could be imposed by the Legislature. The amount of such tax, the manner of collecting it, and the purposes to which it should be applied when collected, are matters of legislative discretion. We can not say that the laws enacted by the Legislature to effect these purposes are unconstitutional, unless they are clearly shown to be in conflict with some provision of that in-

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strument; nor can the court say that the Legislature may not assess the amount of tax it intends levying by different acts, in which the amount collected under one act may be appropriated differently from that imposed by the other." (Id., 299.)

This court has been called on also in several cases to decide this same question. In reviewing the cases and authorities bearing on this matter the court said: "We are of opinion that the act under consideration embraces but one leading subject, which is expressed in the title, and that all of its provisions are subsidiary to, and legitimately connected with, and tend to effect and enforce the main subject embraced in the title of the act; and that all the different sections may be construed to be in harmony with the main subject expressed in the title, including the enforcement of a compliance by the penal sanctions provided in the third section for its enforcement against those who disregard its provisions, 'the leading object of the law being to tax the privilege of keeping or harboring dogs, and to provide for an assessment and collection thereof.'" (Ex parte Mabry, 5 App., 99, 100; See also Giddings v. San Antonio, 47 Texas, 548; Albrecht v. State, 8 App., 216; Johnson v. State, 9 App., 249; Thompson v. State, 17 App., 253.)

With reference to the giving the bond and its conditions, it may be held that they are the required steps to be taken before the issuance of the license, and it would be immaterial whether the same are or are not expressed in the title. (Cooley, Cons. Lim., p. 181; People v. Briggs, 50 N. Y., 566; Phillips v. Bridge Co., 2 Met., Ky., 222; Smith v. Com., 8 Bush., 112; Ex parte Upshaw, 45 Ala., 234; Ex parte Mabry, 5 App., 93, and authorities there cited.)

The bond required in the two acts of March 11 and April 4, 1881, has been held a good bond by our Supreme Court. (Goldsticker v. Ford, 62 Texas, 385.) Under the act of 1887, this court held that the bond must be given and the license taken out by the party desiring to pursue the occupation of selling liquor. (Ex parte Bell, 24 App., 428.) Upon these questions the indictment is valid, and not objectionable on the grounds of the motion as presented.

Are the laws unconstitutional because the advance payment of the tax for one year as a condition precedent to appellant's engaging in the occupation of liquor selling is required, while for other occupations quarterly payments in advance are per-

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Argument for the state.

mitted? Under the authorities already cited and quoted, said laws are not unconstitutional, and can not be so held. The government may tax one occupation or it may tax all. There is no restriction upon its power in this regard unless one is expressly imposed by the Constitution. (Cooley on Taxation, p. 384; Butler's Appeal, 73 Penn. St., 448.)

It is not special class legislation, because it bears equally upon every one who engages in that particular occupation. None are exempt from its provisions and penalties, but all are required to comply with its provisions and all are forced to pay the tax in advance as demanded by the statute. It is uniform and bears alike on all who engage in that business. (Bohl v. The State, 3 App., 683; Thompson v. State, 17 App., 253.)

The Legislature can levy one amount upon one occupation, another amount upon another occupation, and require its payment in advance either annually or quarterly, and as long as that tax is uniform and equal upon all who engage in the named occupation, it will be uniform and not repugnant to the Constitution.

Another objection urged to the indictment is that it is defective in not alleging that the defendant had not procured a license before the finding of the indictment. Appellant cites and relies upon Penal Code, article 112. The indictment does allege the fact that the defendant pursued the occupation without having obtained a license therefor. Appellant was indicted under article 110 of the code for failing to obtain his license before engaging in the occupation denounced. It was only necessary to bring the indictment within the rule laid down in that article. It is not required to set out in the indictment the negative matters of defense enumerated in article 112 of the code. Those matters, by being placed in a separate statute or article, became defensive matters, and the pleader is relieved of the necessity of pleading same, and the further necessity of negativing them. (Lewis v. The State, 7 Texas Ct. App., 567; Zallner v. The State, 15 Texas Ct. App., 23.)

But where exceptions are embraced in the enacting clause, the indictment should negative each of said exceptions. (Duke v. The State, 42 Texas, 455; Woodward v. The State, 5 Texas Ct. App., 296.)

The State is required to allege, by proper averments, that a defendant has pursued the given occupation of retail liquor dealer in selling in quantities less than one quart, without first

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having obtained his license therefor; and if the city or county or both are to be taken into account, then it is proper to allege the legal amount of taxes levied on said occupation by said county or city or town. This being done, the proof would be that the party charged had followed and engaged in said occupation without obtaining his license, and that the county and city had levied the proper tax thereon, and the State's case is made out.

The defendant must avoid this by showing that he had brought himself within the exceptions laid down in article 112 of the code. It would hardly be contended that he, having paid the taxes and costs of prosecution, would be exonerated from the penalty denounced by article 110. The license is the *sine qua non* before engaging in the business. (Penal Code, arts. 110, 112; Acts Seventeenth Legislature, 1881, p. 34.)

The punishment denounced and affixed by article 110 is not less than the amount nor more than double the amount of the taxes so due. It will be observed that the words "so due" in said article 110, in order to be properly understood in connection with article 112, and in showing the legislative intent, should be held to have the same meaning as if that expression read "so levied." It is clear that the Legislature was intending to affix a penalty and to give a criterion for assessing the penalty. It did not mean to say or to convey the idea that the tax must be unpaid and owing or unsatisfied. It only defined the offense and fixed the rule for determining the punishment for the failure to obtain the license.

The exception to the charge is not taken so as to require a reversal of this case, even should the charge be defective, as claimed in the bill of exceptions. This is a misdemeanor. In order to secure any advantage of the supposed error or weakness in the charge, the appellant must not only reserve his bill of exception thereto, but he must request a special charge covering the supposed defect in said charge. (Forrest v. The State, 3 Texas Ct. App., 252; Work v. The State, 3 Texas Ct. App., 233; Richards v. The State, 3 Texas Ct. App., 423; Lloyd v. The State, 19 Texas Ct. App., 321.)

HURT, JUDGE. This is a conviction for pursuing and following the occupation of selling spirituous, vinous and malt liquors, in quantities less than one quart, without first having obtained a license therefor, and without having paid the tax required by

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law. This prosecution is based upon the acts of March 11, 1881, and April 4, 1881.

Appellant moved to quash the indictment upon several grounds:

1. Because the laws of March 11, 1881, and April 4, 1881, levying the occupation tax and providing for the issuance of a license, are unconstitutional and void in this, that said acts contain more than one subject, to wit: the exercise of the police power and that of taxation for general revenue, and embrace subjects not expressed in the titles of the bills.

2. Said acts are unconstitutional in this, that they require the said payment of the tax to the State, county and city in advance for the term of one year as a condition precedent to the right of pursuing said occupation, while all others are permitted to pay quarterly; and are in conflict with and repugnant to sections 13 and 19 of the Bill of Rights, and sections 2 and 3, article 8, of the State Constitution, and the fourteenth amendment to the Constitution of the United States, in this, that they require a license of persons pursuing the occupation of appellant, and of the billiard table keeper, and require none of persons pursuing any of the other occupations taxed by law, and provide no means for obtaining a license by such other persons.

First ground:

Do the acts of March 11, 1881, and April 4, 1881, contain more than one subject? If so, they are void. The Constitution provides that "no bill shall contain more than one subject, which shall be expressed in the title." (Art. 3. sec. 35.) In the preceding Constitution the word "object" was used instead of the word "subject."

Judge Bonner, in Stone v. Brown (54 Texas, 341), observes that "it may be presumed that the convention had some reason for substituting a different word from that which had been so long in use in this connection; and that in the light of judicial expressions the word 'subject' may have been thus substituted as less restrictive than 'object.'" In The People v. Lawrence (36 Barbour, 192), the Supreme Court of New York say: "It must not be overlooked that the Constitution demands that the title of an act shall express the *subject*, not the *object*, of the act. It is the matter to which the statute relates and with which it deals, and not what it proposes to do, which is to be found in the title. It is no constitutional objection to a statute

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that its title is vague or unmeaning as to its *purpose*, if it be sufficiently distinct as to the matter to which it refers."

What, then, is the subject of the acts of March 11, 1881, and April 4, 1881? Most clearly the subject of these acts is the regulation of the sale of spirituous, vinous and malt liquors and medicated bitters. Now, if there be but one subject in the act, but more than one object, the act would not be obnoxious to the Constitution.

We could concede, for the argument, that the object of these acts is to regulate the sale of these liquors, to collect revenue and divers other purposes and objects; still, unless there was more than one subject in the act, it would be valid—constitutional.

Again: Suppose that there be more than one subject mentioned in the acts. If they be germain or subsidiary to the main subject, or if relative directly or indirectly to the main subject—have a mutual connection—and are not foreign to the main subject, or so long as the provisions are of the same nature and come legitimately under one general denomination or subject, we can not hold the act unconstitutional. (Giddings v. San Antonio, 47 Texas, 556; Breen v. R. R. Co., 44 Texas, 306; Austin v. R. R. Co., 45 Texas, 267; Phillips v. Bridge Co., 2 Met., Ky., 222; Smith v. Commonwealth, 8 Bush, 112; State v. County Judge, 2 Iowa, 284; Battle v. Howard, 13 Texas, 345; Murphy v. Menard, 11 Texas 678; Tadlock v. Eccles, 20 Texas, 792.)

We are of opinion that these acts do not contain more than one subject.

Second Ground:

"That the acts above cited require payment of the tax in advance for the term of one year as a condition precedent to the right of pursuing said occupation, while all others are permitted to pay quarterly; and hence in conflict with and repugnant to sections 13 and 19 of the bill of rights, and sections 2 and 3, of article 8, of the State Constitution, and the fourteenth amendment to the Constitution of the United States, in this, that they require a license of persons pursuing the occupation of appellant and of the billiard table keeper, and require none of persons pursuing any other occupation taxed by law, and provide no means for obtaining a license for such persons."

Answer to these objections:

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Opinion of the court.

1. The Constitution confers the power upon the Legislature to impose occupation taxes. (Art. 8, Sec. 1.)

2. But all occupation taxes must be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. (Sec. 2, Art. 8.)

Upon this occupation the State tax is the same all over the State, and if a county desires to impose a tax upon this occupation it must be equal and uniform over the county—that is, all persons must be required to do and perform the same things as acts precedent to the right to pursue the occupation in said county, and they must pay the same amount of tax—neither more nor less. So within the limits of cities and towns.

It is evident that the tax imposed upon the occupation of selling in quantities less than one quart the liquors named in the acts cited is equal and uniform in the State; and it appears from this record that it is equal and uniform within the limits of Galveston county. The Legislature is the authority levying the State tax; the county of Galveston, through the commissioners court, is the authority levying the county tax within the county limits. The tax being equal and uniform in every particular over the State as to the State tax, and being equal and uniform within the limits of the county of Galveston, instead of being obnoxious to the State Constitution, these acts are in strict conformity with its requirements.

The above observations apply to the objection that the persons proposing to follow this occupation must pay in advance for the term of one year as a condition precedent to the right to pursue it; while upon all others they are permitted to pay quarterly. This being required of all of the same class alike, the Constitution is by no means infringed; and in addition to this the requirement is founded in the highest considerations of public policy and common sense.

It is insisted that the tax is unequal and not uniform, "because a person pursuing the occupation in some counties would not be required to pay as much as in others; that the cities and counties are not required to assess this tax, and if they do, they may assess it at a greater or less sum in the different cities and counties, etc., and, as the penalty depends on the amount assessed, it would not be the same, it would not be uniform over the State." This is evidently correct, but constitutes no objection to the law.

In the Banking & Insurance Company v. The State (42

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Texas, 636) an analogous question arose. The State sued the company for occupation tax. The company interposed a constitutional objection to the tax, contending that it was not equal and uniform throughout the State. The statute provided that those pursuing such occupation should pay a tax of two hundred and fifty dollars, if the business was carried on in a city or town exceeding five thousand in population. Galveston, the city in which the occupation was followed, contained a population greater than five thousand. The act also provided that, if the population was less, a tax of fifty dollars should be paid.

The Supreme Court (opinion by Moore, J.) held that such a tax was equal and uniform; and this opinion is approved in Blessing v. City of Galveston. (Id., 641.) These opinions were rendered under the preceding Constitution, which contained this provision: "Taxation shall be equal and uniform throughout the State." The present Constitution settles this question beyond all controversy, there being a special provision relating to occupation taxes, which is: "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." The limit of the State's legislative authority is the whole State; that of the county, city or town is their respective boundaries.

That the State tax is equal and uniform is not questioned here. Now, if the tax imposed by the counties, cities and towns is equal within their limits, the imposition of such tax would not be obnoxious to the Constitution, but would be in exact accord with the above provisions, though in other counties, cities or towns the tax may not be the same.

So far as the fourteenth amendment of the Constitution of the United States is concerned, it certainly was not intended to prohibit the States from enacting laws regulating the traffic in these liquors, so long as they do not abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property, without due process of law, or deny any person within its jurisdiction the equal protection of laws. These acts do none of these things. If they do, then the State would not have the right to tax one occupation greater than another, nor to require a license or bond as conditions precedent to the pursuing of any occupation, unless such requirements were made of persons proposing to pursue any oc-

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cupation. If this be the proper construction of the amendment, then the text writers, and supreme courts and legislatures of most, if not all, the States have misconstrued it; for acts with like provisions in substance have been passed by nearly if not all the States, and have been upheld by the highest judicial authority thereof. Nor can a case be found, we assert, holding that, because of such provisions in an act, to wit: requiring payment in advance for one year, etc., such payment not being required for all occupations, is an infringement of the fourteenth amendment to the Federal Constitution.

Third ground:

"That the indictment is defective because it does not charge that defendant had not purcured a license *before* the finding of the indictment." The indictment alleges every element of the offense. This is no exception or proviso in the enacting clause: it is matter contained in article 112 of the Code, and is defensive in its character; hence the accused must bring it forward, or it must appear on the trial that the taxes have been paid—this being a question of fact and not of pleading.

Appellant excepted to the following charge:

"If the evidence satisfies the jury beyond a reasonable doubt that the defendant did, as charged in the indictment, pursue in the county of Galveston, State of Texas, the occupation of selling spirituous, vinous and malt liquors in quantities less than a quart, between the first day of October, 1886, and the twenty-fourth day of January, 1887 (the date of filing the indictment), without having paid the occupation tax of three hundred dollars to the State, and one hundred and fifty dollars to the county of Galveston, and the said taxes were then due, and owing, and unpaid, to the State and county respectively, say you find the defendant guilty as charged in the indictment, and assess his punishment, which is fine not less than four hundred and fifty dollars, nor more nine than hundred dollars." The objections are, first, that the charge does not correctly define the offense; and second, it does not give the penalty correctly, and is upon the weight of evidence, etc.

Appellant being charged with pursuing the occupation without license, counsel for appellant contend that the charge is incorrect, because it substitutes "without having paid the tax" for "without having obtained a license," etc. If appellant had in fact paid the taxes and procured the license as required by article 112, as amended March 15, 1881, he could not have been

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Syllabus.

convicted, though he may not have had a license. This being so, the charge was more favorable to him than the law.

It is urged that the charge assumed a fact to have been proven, and is therefore upon the weight of evidence. The court, in its charge, does assume that the commissioners court of Galveston county had assessed a tax of one half of the State tax upon the occupation. That such a tax had been assessed there can be no doubt; this was admitted by appellant on the trial, and the State introduced no evidence to prove it because of its admission. This being the case, the court did not err in assuming this to be a fact. Nor did the court err in charging that the penalty was not less than four hundred and fifty dollars, nor more than nine hundred dollars—this proposition depending upon the foregoing.

We find no error in the judgment, and it is affirmed.

Affirmed.

Opinion delivered January 30, 1889.

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No. 2546.

ALBERT JOHNSON v. THE STATE.

1. PRACTICE—CONFESSION—CROSS EXAMINATION OF A WITNESS.—The proof on a trial for rape was in direct conflict as to the identity of the defendant as the person who committed the offense. A defense witness having testified to facts tending to establish in favor of the defendant a case of mistaken identity, the State, over objection of defendant, was permitted to interrogate the witness as to whether or not, subsequent to the alleged offense, he received from the defendant a letter confessing his guilt, and making a statement concerning, and asking information about, the commission of the offense. In permitting this manner of examination the court erred, because, first, if, as manifest, the purpose of the State was to prove that the witness received from defendant a letter written by him and confessing his guilt, it should first have summoned the witness with a *subpœna duces tecum* to produce the letter in court. Failing then to produce the letter, the witness might be examined to prove the reception by him of such a letter, and that to his knowledge it was written by defendant. But then the contents of the letter could not be proved by the witness without proof of the loss or destruction of the same. Second, if the object of the State was to impeach the witness, then the fact whether or not he had received

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Statement of the case.

a letter from the defendant was the only fact about which the predicate was allowable, and, the witness having answered that question in the negative, the limit of the investigation was reached, under the rule that "when a witness is cross examined on a matter collateral to the issue, his answer can not be subsequently contradicted by the party putting the question." This rule was further violated in this case by permitting the State to contradict the witness by another witness, as to the letter.

2. RAPE—CHARGE OF THE COURT.—The trial court charged the jury as follows: "Penetration is necessary to constitute the offense, but penetration only is necessary to constitute the offense." *Held*, abstractly correct, but insufficient, because, in addition to penetration, it is essential in a rape case to show want of the woman's consent, and that the act was accomplished by force, threats or fraud.

3. SAME—REASONABLE DOUBT.—The court charged further as follows: "It is not sufficient, to secure a conviction, for the State to make out a prima facie case, but the guilt of the defendant must be shown beyond a reasonable doubt; and the failure or inability of the defendant to show his innocence does not lend any additional probative force to the incriminative facts, if any, shown by the State, or raise any presumption of guilt against the defendant." This charge, though abstractly correct, was calculated to lead the jury to believe that, in the opinion of the court, the defense had failed to show innocence. A reasonable doubt of guilt, independent of exculpatory proof, entitles an accused to an acquittal.

4. SAME.—The court further instructed the jury that "the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and, if upon the whole evidence you have a reasonable doubt of his guilt, you must acquit him, and not resolve the doubt by a mitigation of the punishment." This charge is objectionable in that the concluding clause may have induced the jury to inflict the greater penalty instead of the milder one provided by the statutes. Note the suggestion that in charging the reasonable doubt the trial court should follow the language of the statute. (Penal Code, art. 727.)

APPEAL from the District Court of Washington. Tried below before the Hon. I. B. McFarland.

This is the second appeal prosecuted by this appellant from conviction for the rape of Annie Knuppel, on the twenty-sixth day of January, 1886. The penalty assessed on this last trial was death.

The testimony adduced on the two trials was substantially the same, and for the purposes of this Report it is deemed sufficient to state, in succinct form, the substance of the proof upon the one contested issue of fact, which involved the identity of the accused, and to refer to the former report of this case for

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the evidence in detail. (See Johnson v. The State, 21 Texas Ct. App., 368.)

The testimony of Miss Knuppel, the injured party, was the only proof in the case identifying the defendant as the party who committed the outrage, and upon this issue her evidence was direct and positive, except that, when recalled to the stand by the defense, she admitted that if the defendant on trial had a mustache at the time of the rape, then he was not the person who committed it. In substance, Miss Knuppel's narrative is as follows:

The outrage was committed on Tuesday, January 26, 1886, at about one, or half past one o'clock in the day. The place was on the line of the Gulf, Colorado & Santa Fe Railway, about a mile and a half or two miles south of Brenham, near where the public road leading from Brenham to Wesley crosses the railroad track. She was living with her father about four miles south of Brenham, and at the time of the assault was returning home from town, to which she had gone on an errand. She had ridden to town on a wagon with Messrs. Kraemer and Roemer, but returned home on foot, walking along the railroad track. At about a mile and a half or two miles from town she was overtaken by a colored man, who was walking in the same direction with herself but more rapidly. When she first saw him he was about twenty feet behind her. As he got near her she stepped off the track to let him go by. He passed her, and then turned and caught hold of her and struck her with his hand. He then threw her down and had carnal intercourse with her against her will. The man then left her and came back in the direction of Brenham, and she saw him no more. On reaching home she told her mother and sister-in-law, and afterwards her father and others, of the occurrence, describing to them the person of her assailant and the circumstances of the outrage.

According to her statement there was no peculiarity about the man. "He was a middle sized man; he wasn't right black or right yellow, but midway between, and was what is called in German a 'younge,' or young man. He looked to be about twenty years of age, but might have been any where from nineteen or twenty to twenty-five years old; he had no beard or whiskers and no mustache, but had a perfectly smooth face, as smooth as her own. He had a scar on the right side of his face, near the eye. She looked at him well while he had her

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down, and observed the scar on his face then and afterwards. He had on a dark gray coat, dark pants and a gray hat." A black frock coat, Prince Albert style, and a small, stiff, black Derby hat, claimed by the defendant, were exhibited to her, but she said they were wholly different from those worn by her assailant. The coat worn by the party who ravished her was a short sack coat of a gray color; the hat was a soft "slouch" hat, also gray in color. The man remained with her about five or ten minutes. When he overtook her he had a piece of iron in his hand, a fish bar plate, about twelve or fourteen inches long and not quite so wide as her hand. While he had her down he had a rock in his hand. He picked up the rock and then dropped the iron. She could not remember whether he dropped the iron and rock after he got up or not. She had never seen her assailant before. Two colored men, Willie Wills and Anderson Guyton, were arrested and brought before her by the officers shortly after the outrage, both of whom had scars on their faces and otherwise corresponded with the description given by her of her assailant, but she said neither of them was the man who outraged her. She said Willie Wills "had a scar on the right side of his face, near the eye," but he was "not of the right color." She "did not know whether he was lighter or blacker" than her assailant. She "did not know whether he was taller or not." She "did not know whether he was as old or not;" he was "about fifteen or twenty years old;" he was "a middle sized man;" she could not tell whether or not he was taller than the defendant, nor which was the blacker of the two. She has not seen Willie Wills in two years. When they brought Anderson Guyton for her to look at she saw at once that he was not the right man. He was "too small," was smaller than her assailant. She did not think Guyton got off his horse. She did not know whether he had a scar on his face or not.

The defendant was taken as a prisoner to her father's house about the middle of March, 1886, seven or eight weeks after the alleged outrage, when she promptly recognized him as her ravisher, although he was differently dressed and then had a mustache, but "not much of a one." She recognized him "by his whole face;" "by his general appearance," and by "the scar." She "would have known him any way, without the scar." She was positive in her statement that the defendant was the man who outraged her, but, except in the particulars

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named, she did not describe or distinguish him from other persons of his race and color. She did not undertake to give any other peculiarity of form or feature, or to state or approximate his height or weight. With the defendant sitting before her at the trial, she described the scar as being "on the right temple, a little to the right of the eye," and said "it curved up in a circle, the middle part going upwards." With reference to his age, she then said he was "from twenty to twenty-seven years of age;" "not twenty, but between twenty and twenty-seven."

She stated that the suspected parties were not all brought before her at the same time, but separately, and when the defendant was brought to her for identification she was apprised of the purpose of his being brought, and no test whatever was made to ascertain whether she would be able to single him out of a crowd.

She thus describes the scene of the outrage: "It was on the Santa Fe railway track about a mile and a half or two miles south of Brenham, and about two hundred yards north of where the public road leading from Wesley to Brenham crosses the railroad track. "It was not in a cut," but the embankment was "two or three feet high." She "could see over it." Two rent houses were in plain view, not more than three hundred and fifty or four hundred yards distant. The parties were also in plain view of persons traveling the Wesley road and of any one passing on the railway. Her assailant laid her down between the banks of the railway on the right hand side of the track, but off of the track; her feet were pointing towards the track, her head was angling north. The alleged outrage took place shortly after noon, at about one or half after one o'clock.

When recalled by the defendant she stated again, in the most positive language, that the party who had assaulted her had no beard whatever on his face—neither whisker nor mustache. "If this man," she said, "had a mutache on the twenty-sixth of January, 1886, then he is not the man that ravished me." On further examination by the State she reaffirmed her conviction that the defendant was the guilty party. "I have no doubt whatever," she said, "about his being the man."

The remaining testimony for the State, as may be seen by reference to the previous report, clearly establishes the penetration of the girl's private parts, and otherwise supports her narrative except as to the identity of the offending party, with respect to which it is not directed. It is not, however,

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essential to the question of evidence involved in the disposition of this appeal, and, therefore, is not here recapitulated. It may be stated, however, that no witness, testifying for the State, claimed to have seen the defendant in the vicinity of Brenham, or the scene of the outrage, at any time near the day of the alleged outrage, or to have known him at any time when he answered, in appearance or dress, to the description given by Miss Knuppel of her assailant. It was shown that defendant was arrested in Austin county, seven or eight weeks after the alleged outrage.

The defense relied upon was an alibi and mistaken identity—that he was not the person who committed the offense. To support the first of these defenses he proved by the persons with whom he was living and working—six different parties—that he was at his work, some three or four miles from the place of the alleged offense, on the day of its occurrence and during that entire week. During his stay in the neighborhood, which lasted about five weeks—from the beginning of January to February 6—he came to Brenham but twice—once, about the middle of January, to meet his wife and take her to his sister's, with whom he was boarding; the other time a few days later, when he accompanied his wife as far as Brenham on her return to Bellville. On both of these occasions he rode a mule belonging to Ford, and led the horse which had been ridden by his wife. The witness, Willis Jackson, taught school on the road traveled by the defendant and Ford and his wife in going to and from their work. On Monday, January 25, the day before the alleged outrage, the defendant came to the school house and inquired of witness when he expected to go to Brenham, and, learning that he would go on Wednesday, the twenty-seventh, which was witness's lodge night, defendant requested him to call for his mail, which witness did, waking him up to deliver it on Wednesday night, the day following the commission of the alleged offense.

Upon the remaining defense—that he was not the person who committed the outrage—the defendant proved by the six witnesses by whom he sought to establish an alibi, and by fifteen others living in and about Bellville—some white and some black—including the sheriff, the county attorney and the judge and ex judge of the county court, that they had known him for periods ranging from five to fifteen years, and that he had worn a mustache for several years continuously up to the

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time of this trial. The same witnesses testified that they had never seen the defendant dressed in clothing similar to that which, according to the testimony of Miss Knuppel, was worn by her assailant.

The principal ruling upon this appeal is based upon the action of the trial court with respect to the examination of the defendant's witness Robert Ford. The said Ford was one of the six parties who, being introduced by the defendant, testified to the facts constituting the alibi relied upon, and also to the fact that the defendant had a mustache at the time of the alleged outrage, and that he owned no such clothes as those described by Miss Knuppel. The method of cross examination to which the ruling of this court is particularly directed appears fully in the opinion.

In rebuttal of this witness, the State introduced the witness Wash Boulding, Jr., to whom it propounded questions and elicited answers as follows:

Question. "Did you or not, shortly after the rape upon Annie Knuppel, in the city of Brenham, between Lehman's bar room and Julia McFarland's book store, at the request of Robert Ford, a brother-in-law of the defendant, read a letter directed to said Ford?"

Answer. "I did, shortly after the rape, read a letter for Robert Ford at the place mentioned, said letter being to him."

Q. "State whether or not said letter was, or purported to be, from the defendant, and made any statement about the said rape, and inquired of said Ford who was suspected of its commission, and if defendant was accused of it."

To which question and any answer thereto the defendant, by his counsel, objected, which objection the court sustained and refused to allow said witness to answer the same; whereupon the State's counsel inquired of said witness:

Q. "Do you know the defendant's hand writing, and was said letter in his hand writing?"

A. "I do not know whether it was in defendant's hand writing or not. I do not know defendant's hand writing."

Q. "Don't tell what was in the letter, or who it was from, but state who was present at the time you read the letter to Ford. And how did you happen to read the letter? Was it before or after defendant's arrest? Was the letter directed to Ford."

A. "I read the letter for Ford before defendant was arrested

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on this charge. Ed Deadman and Willis Boulding were present at the time. I was standing on the sidewalk, at Lehman's bar room, with Ed Deadman and Willis Boulding. Robert Ford came up to us and asked me to read the letter for him, as he could not read. We stepped off the sidewalk into the street a little way, between Lehman's bar room and McFarland's book store, and I read the letter to Ford. It was directed to him."

B. H. Bassett and *E. B. Muse*, for the appellant: We insist that the court erred in admitting, over defendant's objections, the testimony elicited from the witness Robert Ford with reference to an alleged letter written by the defendant; because, 1. The letter (if such ever existed) was the best evidence. No effort having been shown by the State to procure or produce such letter upon the trial or prove its loss, the testimony was secondary. 2. The testimony was inadmissible, because the execution of the letter in defendant's handwriting had not been shown, and no promise upon the part of the State was made to show such fact. 3. Said testimony was illegal and irrelevant to the issue of defendant's guilt, and was prejudicial to the defendant.

The court erred in admitting the testimony of Boulding; because:

1. The alleged letter was not shown to have been written by defendant, or by his direction, or to have been in his handwriting.

2. Because no basis for an impeachment of the witness Ford had been laid by the State; no specified time, place or circumstance having been stated.

3. Because the letter read (if any), not being shown to have been from the defendant, the impeachment of the witness Ford by Boulding was upon an immaterial issue in the case, the same not tending to establish the guilt of the defendant by legal evidence.

4. Because it did not appear that the defendant had in fact written any letter to Ford, or that Ford had received such, or that Boulding had read such a letter from the defendant.

5. Because the testimony was illegal and irrelevant, and because the tendency if not the purpose of the testimony and examination in connection with the testimony of the witness Ford, hereinbefore excepted to, was to impress the jury with the idea

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Argument for the appellant.

or belief that the defendant had written a letter to Ford confessing or tending to show his guilt.

6. Because said testimony was calculated to prejudice the jury against the defendant, and tended to create in the minds of the jury a belief of defendant's guilt. But the court overruled said objections and admitted said testimony to the jury, to which decision of the court the defendant then excepted; and thereafter the defendant moved the court to strike out all of said questions and answers and testimony of said witness Boulding, and to instruct the jury to disregard the same, which was refused, and the defendant duly excepted to said rulings.

The charge did not in any way restrict the effect of the testimony.

It is submitted: 1. That the jury would readily connect the excluded letter, in relation to which Boulding spoke, with that concerning which Ford had been interrogated, and would naturally infer that Boulding had seen and read a letter from the defendant to Ford containing a substantial confession of his guilt; which would, in the language of the Supreme Court, in The City of Galveston v. Barbour, 62 Texas, 175, be but another mode of bringing before the jury parol evidence of the contents of the letter.

2. The admission of the evidence constitutes reversible error, the evidence having been admitted over objection, and its probable influence being prejudicial. (Malcomson's Case, 25 Texas Ct. App., 268, 291.)

3. That the attempted impeachment should have been restricted to the exact predicate laid; and that neither time, place nor circumstance being laid in the predicate, the impeaching evidence was improperly admitted. (Henderson's Case, 1 Texas Ct. App., 432; Treadway's Case, Id., 668; Williams's Case, 3 Texas Ct. App., 316; Walker's Case, 6 Texas Ct. App., 577.)

4. That the attempted impeachment was on a wholly irrelevant and immaterial fact, the alleged letter not being shown to have been written or sent by the defendant, and no *subpœna duces tecum* or other effort being taken to secure the production of the letter itself. (Estep's Case, 9 Texas Ct. App., 336; Walker's Case, 6 Texas Ct. App., 577; Rainey's Case, 20 Texas Ct. App., 473; 1 Greenl. Ev., secs. 560, 562, 575, 577.)

5. And even should it be held that the evidence was properly admitted for purposes of impeachment, the charge should have restricted its use to that specific purpose. (Maines's Case, 23

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Texas Ct. App., 568, 572; Washington's Case, Id., 336, 338; Barron's Case, Id., 462, 475; Davidson's Case, 22 Texas Ct. App., 373, 382; Taylor's Case, Id., 530, 545; Rogers's Case, 9 S. W. Rep., 763, 768.)

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant's record now before us presents a second appeal taken by him in this case. He has twice been convicted of rape—his punishment the first time being assessed at imprisonment in the penitentiary for ninety-nine years, and on the second trial, from which this appeal is taken, there is an assessment of the death penalty as his punishment. (Johnson v. The State, 21 Texas Ct. App., 368.)

In the view we take of the present record, and of the duty devolving upon us as to the disposition to be made by us of the case here presented, it is unnecessary, and would perhaps be profitless to notice the questions arising upon the rulings of the court in relation to matters occurring preliminary to the trial upon the merits; since it is not probable that they will again arise upon another trial.

One of the most important issues which arose upon the trial in the court below was as to the identity of the defendant as the party who had committed the crime. Whilst the prosecutrix had sworn positively to the identity of the defendant as the man who ravished her, she said, nevertheless as positively that "if this man (defendant) had a mustache on the twenty-sixth day of January, 1886 (the day she was ravished), then he is not the man that ravished me." On this issue, thus squarely made, defendant had produced a number of witnesses, white as well as black, and some of them men of prominence, whose testimony was almost positive to the fact that defendant did wear a mustache on the twenty-sixth of January, 1886. And the same may be said with reference to the difference in the clothing worn by the ravisher and that worn by defendant. In other words in short, the effort of the defendant was to meet every part and portion of the testimony of the prosecutrix descriptive of the identity of the party who outraged her, and to show that it was a case of mistaken identity with her, and that it was impossible he could have been the guilty party.

In this attitude of the case, the State, over objections of defendant, was permitted to cross examine the defendant's witness Robert Ford as follows, viz.:

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Question by the State: "Did you not, after the rape of Annie Knuppel, receive a letter from the defendant inquiring of you about the commission of said rape, who was suspected of it, and if he was accused of its commission?"

Answer: "I never, at any time, received a letter from the defendant, after or before said alleged rape, nor did I receive any letter from him inquiring of its commission or asking if he was accused of it."

Q. "Did you not, after said rape, receive a letter purporting to come from defendant, making a statement about the rape, or inquiring if defendant was accused of it?"

A. "I never received any letter from defendant, or from any one else, or purporting to come from defendant, making a statement about the rape, or inquiring if defendant was accused of it. I do not read or write. I do not know defendant's hand writing."

Q. "Did you not, in Brenham, after said rape, request Wash Boulding, Jr., to read a letter for you, and did he not then read to you a letter from the defendant to you, in which defendant stated that he had committed the rape, and inquiring of you who was suspected of its commission, and if he was accused of it?"

A. "No. Wash Boulding never read any such letter for me nor any other letter for me, either after the rape or before it. I never received such a letter or any letter from defendant or any one else, in reference to the rape. Never received any letter from defendant, or purporting to be from him, after he left my house, after the alleged rape."

"Which testimony was objected to by the defendant at the time it was offered, on the grounds: (1) That the letter (if such ever existed) was the best evidence; that no effort had been shown by the State to procure or produce such letter upon the trial, or to prove its loss; and that the testimony was secondary: (2) That the testimony was inadmissible because the execution of the letter in the defendant's hand writing had not been shown, and no promise upon the part of the State was made to show such fact: (3) That said testimony was illegal and irrelevant to the issue of defendant's guilt, and was prejudicial to the defendant.

"But the court overruled said objections and admitted said testimony to the jury, to which decision of the court the defendant then duly excepted; and thereafter the defendant

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moved the court to strike out said testimony and instruct the jury to disregard the same for the reasons and upon the grounds above alleged; but the court overruled said motion to strike out, and refused to exclude said evidence from the jury; to which decision of the court the defendant then excepted," etc.

Manifestly the object of this method of examination of the witness was to impress the jury with the idea that the witness had received a letter from defendant, in which the latter confessed that he had committed the crime. If the object was to prove the fact that such a letter had actually been written and received, then the proper practice would have been, in the first place, to have summoned the witness with a *subpœna duces tecum, or notice,* to produce the letter in court. (1 Greenlf. Ev., 13 Ed., secs. 557, 558, 559, 560.) Failing or refusing to produce it, the State then might have proven the fact by him, if a fact, that he did receive a letter, and if the witness knew that defendant wrote it, from his knowledge of his handwriting, or otherwise, he might also prove that fact. But, unless the letter was lost or mislaid so that it could not be produced, its contents even then could not be proven by the parol evidence of the witness, the letter itself being the best evidence of its contents so long as it was in existence.

Again, if the object was to impeach the witness, then the fact that he had or had not received a letter from defendant, which was the only fact about which the preliminary inquiry and predicate were allowable (Walker v. The State, 6 Texas Ct. App., 577), would be wholly immaterial in the case. And the witness having answered that question in the negative, that would be an end of the investigation, under the well established rule that " when a witness is cross examined on a matter collateral to the issue his answer can not be subsequently contradicted by the party putting the question." (Whart. Crim. Ev., 8 Ed., sec. 484; Brite v. The State, 10 Texas Ct. App, 368; Hart v. The State, 15 Texas Ct. App., 234; Johnson v. The State, 22 Texas Ct. App., 207; Rainey v. The State, 20 Texas Ct. App., 474.)

But the State did not stop the investigation of the matter with the denial of the witness that he had ever received such a letter, but called Wash Boulding, Jr., to the stand to contradict and impeach the witness Ford in this matter. This was in violation of the rule of evidence above quoted. This wit-

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ness Boulding was permitted, over defendant's objections, to testify that Ford had requested him to read a letter directed to Ford, and that he did not know in whose handwriting the letter was, nor did he know defendant's handwriting. Boulding's testimony, under the facts, could not in the very nature of things impeach Ford as to a letter received by him from defendant, because there is no positive, certain or reliable evidence that defendant ever wrote such a letter, or that Ford ever received it, or that Boulding ever read a letter from defendant. Boulding may have read such a letter as he describes, but he can not know, nor do we, that the defendant wrote that letter, and until it is established by some legal method that he did write it, he can not in right, justice, good conscience or law, be held by any admissions it might contain.

It was most unfair and prejudicial to defendant's rights to conduct the investigation with regard to this letter in the manner in which it was done. No doubt the jury were firmly impressed with the fact that defendant had written a letter to Ford in which he confessed his guilt of this most heinous crime. The character of the investigation and the facts allowed to be proven were calculated to have this effect, whether they did or not. They should not have been permitted in the first place, and in the second place the only possible, if at all possible, manner in which the error could have been retrieved and injury avoided, would have been for the court to have stricken out the illegal testimony and instructed the jury to disregard it. We are constrained to repeat in this connection the remarks of Judge Willson in Gazley's case, a case involving a crime of the same nature. He says, "in a case like this, the very mention of which arouses public indignation, and fires the minds and passions of a community with a desire for vengance against the guilty party, the court and counsel engaged in the trial should be scrupulously cautious to accord to the defendants a fair and impartial trial, as free as possible from excitement or prejudice. There should be no clap trap or sharp practice made use of by counsel for the State. No improper means should be resorted to to prejudice the minds of the jury against the defendant in the remotest degree. No testimony should be offered on the part of the prosecution that is not relevant and legal." (17 Texas Ct. App., 283.)

Where the testimony was so doubtfully balanced as to the identity of defendant, who can say but that a bare intimation

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of his having admitted or confessed the crime—unsupported as it was by any legal or reliable fact—was sufficient to kick the beam against him in the minds of the jury.

A number of objections are strenuously urged to the charge of the court to the jury. One or more of the paragraphs may, we think, be properly held obnoxious to the criticisms made upon them. For instance, in the sixth paragraph the jury were instructed that "penetration is necessary to complete the offense, but penetration only is necessary to complete the offense." It is declared by our statute that "penetration only is necessary to be proved upon a trial for rape." (Penal Code, art. 532.) But this does not mean that proof of penetration alone will, in and of itself, be sufficient without proof of the other statutory evidence and ingredients of the offense. The object of the declaration made in this article of the Code was simply to lay down one of the rules of evidence in cases of rape. Mr. Greenleaf says: "In the proof of carnal knowledge it was formerly held, though with considerable conflict of opinion, that there must be evidence both of penetration and of injection. But the doubts on this subject were put at rest in England by the statute of 9 George IV, c. 31, which enacted that the former of the two facts was sufficient to constitute the offense. Statutes to the same effect have been passed in some of the United States." (3 Greenl. Ev., 13 ed., sec. 210.) This is the object and purpose of our statute, to wit, that if penetration, which is essential to carnal knowledge, be proven, that will be sufficient, whether there be proof of injection or emission or not—the latter not being required to be proven.

Though such an instruction is in the language of the statute, and is abstractly correct law, it will be readily perceived that it is incomplete and calculated to mislead without some further explanation. Penetration alone is not the only proof necessary to complete the offense of rape. There must in addition be proof of want of consent of the woman, and that the act was accomplished by force, threats or fraud. (Penal Code, art. 528.)

Again, it occurs to us that the latter clause of the thirteenth paragraph is objectionable. The court thus instructs the jury, viz: "It is not sufficient, to secure a conviction for the State, to make out a prima facie case, but the guilt of the defendant must be shown beyond a reasonable doubt; *and the failure or inability of the defendant to show his innocence* does not lend any additional probative force to the incriminative facts, if any,

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Syllabus.

shown by the State, or raise any presumption of guilt against the defendant." Abstractly the proposition is correct, but the jury may well have inferred from it that, in the opinion of the court, the defendant had failed and been unable to show his innocence. No matter what the defendant's evidence was, or what it amounted to, he would be entitled to an acquittal if the jury had a reasonable doubt of his guilt. (Gazley v. The State, 17 Texas Ct. App., 267; Willson's Crim. Stats., sec. 2427.)

Again, we are of opinion that the latter portion of the fourteenth paragraph of the charge may have operated to the prejudice of appellant. The instruction is in these words, viz: "The defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and if upon the whole evidence you have a reasonable doubt of his guilt you must acquit him, *and not resolve the doubt by a mitigation of the punishment.*" The italicized words may have influenced the jury to inflict, as they have done, the death penalty instead of the milder punishment authorized by law.

With regard to the reasonable doubt, as prescribed in our law by article 727 of the Penal Code, this court has time and again held that the language of this long standing provision law was advisedly selected to express the precise meaning of the maker. "Its entire context should be preserved, and attempts to paraphrase or supplement it in a charge to the jury tend to perplex the jury and breed error." (Willson's Crim. Stats., sec. 2426.)

For the errors we have discussed, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Opinion delivered January 30, 1889.

No. 2648.

ALEX ANDERSON AND JOE WOODS v. THE STATE.

1. NEGLIGENT HOMICIDE—INDICTMENT.—See the statement of the case for the substance of an indictment *held* sufficient to charge the offense of negligent homicide.

2. SAME—WITNESS.—A person charged, either in the same or another indictment, with participation in the offense on trial, is not competent to testify in behalf of the accused. It appears in this case that the

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witness proposed by the defense was indicted, by an incorrect name, for the same offense. *Held* that the proposed witness was properly held incompetent

8. NEGLIGENCE BY OMISSION consists in the omission to perform an act with the performance of which the party is especially charged, and there can be no criminal negligence in the omission to perform an act which it is not the express duty of the party to perform. Under this rule brakemen on a railway train, whose duty is shown to pertain in no degree to the operation of a locomotive, nor to the watching of the railway track, nor the sounding of the danger signal, can not be held liable for the killing of a person by the locomotive, operated by the engineer and fireman, upon whom the duty of operating it exclusively devolved. See the statement of the case for evidence *held* insufficient to support a conviction for negligent homicide.

APPEAL from the District Court of Polk. Tried below before the Hon. Edwin Hobby.

The conviction in this case was for negligent homicide, and the penalty assessed against each of the appellants was a fine of two hundred and fifty dollars.

The indictment impleaded O. Torgerson, engineer, J. A. DeCogne, fireman, and the appellants as brakemen on engine number eleven of the Houston, East & West Texas Railway Company, charging them with negligent homicide of the first degree, and alleging in substance that on the seventh day of February, 1887, while engaged as workmen in running said engine and tender on said railroad, said Torgerson, DeCogne, Anderson and Woods did back said engine and tender negligently and carelessly, without ringing the bell or blowing the whistle, and without giving any warning, and without first looking to see if any person was likely to be injured thereby, and by said negligence and carelessness one Sing Morgan was struck by said engine and tender so run, and the death of said Morgan was caused by said negligence and carelessness—the said Morgan being at the time in a position to be struck by said engine and tender which fact would have been known by said Torgerson, DeCogne, Anderson and Woods if they had used that degree of care and caution which a man of ordinary prudence would use under like circumstances, there being then and there an apparent danger of causing the death of said Morgan and of other persons passing on said railroad and highway.

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Statement of the case.

J. D. Kelley was the first witness for the State. He testified that he was at Hackney's mills, in Polk county, Texas, at the time that the negro child, Sing Morgan, was killed by engine No. 11 of the Houston, East & West Texas Railway Company. He and W. T. Parrish were sitting on the gallery at Hackney's store at the time the killing occurred. The said gallery was situated very near the track of the said railway. At the time the child was killed a train of cars had been divided at a point a short distance north of Hackney's store, and the half of it had been hauled to a point beyond a heavy grade south of the store, and the engine was on its way back to get the other part of the train when the child was killed. The child was run over by the engine and killed at a point on the track about eighty yards north from the gallery of Hackney's store. Witness first observed the engine backing from the south to the north, when it reached a point between seventy-five and a hundred yards south of the gallery. He did not hear the rumbling of the engine until it reached within thirty feet of the gallery. No bells were rung nor whistles sounded at any time during the backing of the said engine, nor was any other signal given. As the engine passed the point where the witness and Parrish were sitting, the witness observed the engineer in his position. He did not see the fireman, but saw the defendants, who were brakemen on the train. One of them was standing on the gangway of the engine and the other was sitting on the wood on the tender attached to the engine. Either of the said parties by looking down the track could have seen the child in its perilous position. The witness saw the child just about the time the engine struck and passed over it. There was nothing on the track to obstruct the view of the parties on the engine and tender, and they could have seen the child in ample time to prevent its death had they kept a lookout. No cars were attached to the engine at the time.

Cross examined, the witness said that he could have seen the child in time to give warning had he been looking over the track in that direction. Witness identified a letter exhibited to him as a letter he wrote to M. G. Howe, receiver of the East & West Texas Railway Company. He had never been paid by Howe not to testify in this case.

W. T. Parrish, for the State, testified substantially to the same facts as Kelley, but stated that he did not see the child until after it was killed. He was looking another way, when

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Kelley remarked: "There is a negro child killed." Had he been looking north he could have seen the child.

On his cross examination, this witness stated that Kelley told him that he, Kelley, had written to Howe, proposing to leave the country, or to fail to testify in this case, for the consideration of five hundred dollars. Witness told Kelley that "he could do as he pleased about it." The witness would not undertake to say whether or not he would have accepted any part of the money, had Kelley secured it.

W. H. Dudley was called by the State, and testified that he did not see the killing, and knew nothing about it until after it occurred. The deceased was a negro child about eighteen months old. The place where passengers and freight were taken on and put off the train, and where the public road crossed the track, was south of the point where the child was killed. No street or road crossed the track at the place of the killing.

The State closed.

Two or three officials of the Houston, East & West Texas Railway testified, for the defense, that the brakemen on their lines had no duties whatever to perform on an engine or tender.

Their duties are well defined, and are performable only on the passenger and freight cars or coaches. The operation of an engine devolves exclusively upon the engineer and fireman, and principally and primarily upon the engineer. He is charged with the duty not only of manipulating or operating the engine, but of keeping a look out over the track and sounding the signals. A heavy grade occupies the space a short distance north and south of Hackney's mills, and it was the custom to divide trains going south at a point north of the mills, and haul them over the grade in sections. The brakemen always accompanied the first section, and rode on the engine back to the section left behind. They had no duties whatever to perform on the engine in returning over the track for the sections left behind.

The defense next introduced in evidence the letter identified by Kelley, which reads as follows:

CORRIGAN, POLK COUNTY, TEXAS, this May 10, 1887.

Mr. M. G. Howe:

It is with pleasure I seat myself to drop you a few lines to let you know that court time air near. That trile will come of.

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That negro is goin to sue for 2000 dollars. If I be a witness he will beet you, for I am the only one that saw the child before it was killed, and if you will pay me 500 dollars I will get out of the way. W. T. Parrish is gon. Let me no sune.

J. D. KELLEY.

R. S. Lovett, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This appeal is from a conviction of negligent homicide of the first degree. The indictment charges the appellants and two other persons jointly with the commission of the offense. Appellants only were put upon trial, and the punishment assessed was a fine of two hundred and fifty dollars against each of them.

We think the indictment is a good one. It follows the statute defining the offense, and alleges all the elements of said offense, setting forth specifically the acts and omissions of the defendants, and alleging that said acts and omissions caused the death of the deceased. (Penal Code, art. 579.)

It was not error to refuse to permit Ducoing to testify in behalf of the defendants. It was made to appear by the State that said Ducoing was one of the persons charged jointly with defendants with the same homicide, but charged under a different name, the true name of said Ducoing having been mistaken by the grand jury presenting the indictment. Said Ducoing was an incompetent witness in behalf of defendants, he being in fact a principal in the offense and in reality but under another name charged as such in the indictment. (Code Crim. Proc., art. 731.)

As we view the evidence and the law applicable thereto, this conviction is not warranted. These appellants were brakemen. They had no control whatever of said engine and tender. They were riding upon the same for the purpose merely of performing their specific duties as brakemen, which duties had no connection with or relation to the homicide. It was the exclusive duty of the engineer and fireman to operate said engine carefully; to look out for obstructions upon the track; to give signals of danger when necessary. With these duties appellants were in no way concerned. They had no right to start the engine in motion, to blow the whistle, to ring the bell, to

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stop the engine, or otherwise to control its movements. They performed no *act* which connected them with the death of the child. It is only for a supposed *omission of duty* on their part that they have been convicted of negligent homicide. They omitted to look out for obstructions on the track. They might have seen the child in time to save its life, but they omitted to see him. Or if they did see him they omitted to stop the train, or to signal the engineer to stop it.

Were these *omissions* criminal, within the meaning of the statute defining negligent homicide? We think not, because, to constitute criminal negligence or carelessness, there must be a violation of some duty imposed by law directly or impliedly, and with which duty the defendant is especially charged. Mr. Wharton says: "Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested." (Wharton on Hom., sec. 72.) Again, this author says, in treating of omissions by those charged with machinery, etc.: "The responsibility of the defendant which he thus fails to discharge must be exclusive and peremptory. A stranger who sees that unless a railway switch is turned, or the car stopped, an accident may ensue, is not indictable for not turning the switch or stopping the car. The reason for this is obvious. To coerce, by criminal prosecutions, every person to supervise all other persons and things, would destroy that division of labor and responsibility by which alone business can be safely conducted, and would establish an industrial communism, by which private enterprise and private caution would be extinguished. Nothing can be effectually guarded when everything is to be guarded by everybody. No machinery could be properly worked if every passer by were compelled by the terror of a criminal prosecution to rush in and adjust anything that might appear to him to be wrong, or which was wrong, no matter how it might happen to appear. By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed." (Ibid, sec. 80.) And upon the subject of omission to give warning of danger, the same author says: "The test here is, is such notice part of an express duty with which the defendant is exclusively charged? If so, he is responsible for injury which is the regular and natural result of his omission; but if not so bound, he is not so responsible." (Ibid, sec. 81.)

These rules of the common law are not inconsistent with our

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statute, but are in harmony therewith, as we construe it. As we understand both the common law and the statute, there can be no criminal negligence or carelessness by *omission* to act, unless it was the especial duty of the party to perform the act omitted. Negligence or carelessness by *omission* presupposes duty to perform the act omitted, and can not, in law, be imputed except upon the predicate of duty.

In this case the evidence is uncontradicted and clear that appellants did not do any act or omit to do any legal duty, with reference to the deceased child. In law they are no more responsible for the death of the child than any other person who was present and witnessed the accident. They were strangers to the transaction, in contemplation of the law, because they were not charged with any duty with respect to it.

We are of the opinion that the judgment of conviction is contrary to the law and the evidence, and therefore said judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered February 2, 1889.

No. 2527.

JOHN McGOWAN v. THE STATE.

THEFT—FACT CASE—See the statement of the case for the substance of evidence *held* insufficient to support a conviction for theft of a hog, because the true ownership is left in doubt, and the taking was in good faith.

APPEAL from the County Court of Walker. Tried below before the Hon. J. M. Smither, County Judge.

This conviction was for the theft of M. G. Dickie's hog, and the penalty assessed against the appellant was a fine of ten dollars and confinement in the county jail for twenty-four hours.

M. G. Dickie was the first witness for the State. He testified, in substance, that, early in the year 1887, he moved from Doctor Thomason's place, in Walker county, to another place some

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miles distant in the same county. He left a sow and pigs at the said Thomason place. They ran on the range near the said place. He made a practice of going back to the range about once a week and feeding the said animals, by which means he was able to keep them gentle. He missed three of the said pigs from the range in October, 1887, which said pigs at that time were about seven months old, and were worth about two dollars each. About a month later the witness and El York went to the house of the defendant in Walker county, and witness asked defendant if he had any hogs. Defendant replied in the affirmative. Witness then told him that he had lost some hogs, and wanted to look through his stock. Witness, defendant and York then went to the defendant's field, where the witness found his said three pigs, and took them home, with the consent of the defendant. The animals were taken from the possession of the witness without his consent.

Cross examined, the witness said that he last saw the pigs (before he found them in defendant's field) about a week before he missed them. Of the hogs left on the range near Thomason's by the witness, only the old sow was marked. Witness gave El York one of the pigs for telling him where he would find the missing animals. The witness denied that, on the day he recovered the pigs, he met Albert Hightower in front of his, Hightower's house, and pointed out to Hightower a certain black sow which he said he would swear belonged to him, witness. He may have said that he believed the sow to be his. Witness did not remember that, in defendant's field, before finding the pigs, he said if they were his pigs they would come to his call, and that after he found them he called, but they refused or failed to answer his call.

El York testified, for the State, that, one day in October, 1887, he met the defendant in the bottom, about a mile from his, defendant's, house, driving a wagon that contained a sow. He told witness that his son Lee had found, in a certain haw thicket, a certain sow of his, defendant's, and had tied it down and that he was going after it. When the defendant, a short time afterward, again passed the witness, he had three of M. G. Dickie's pigs in his wagon. Witness knew those pigs to belong to Dickie. Defendant and his son Lee, who was with him, drove on toward home with the pigs. They were the same animals that witness and Dickie afterward found in defendant's field. On the day that Dickie and witness got the hogs,

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Statement of the case.

the defendant said that he would have marked all three of them, but was afraid they would return to the range and somebody would accuse him of stealing them; that his son did mark one of them without his consent.

On his cross examination, the witness said that the feeling existing between him and the defendant was not friendly. Dickie gave witness one of the pigs for telling him where to find them.

The State closed.

Albert Hightower testified, for the defense, that he and defendant were neighbors. He knew a certain sow that was given to defendant by his mother. That sow had pigs, and she and the pigs disappeared when the pigs were about a month old. The said pigs were about as old as the pigs that Dickie claimed and took from defendant. The defendant claimed to own the three pigs that Dickie claimed and took from him. On the day that Dickie recovered the three pigs, he directed witness's attention to a certain black sow, and said that he, Dickie, would swear that he, Dickie, owned that sow. The witness knew as a matter of fact that that sow belonged to the defendant.

Bob Handy testified, for the defense, in substance, that he was present when the defendant and his son caught the three pigs and put them in a wagon and took them home. When caught by defendant and his son, those pigs were with a sow which the witness knew to be an animal that was given to defendant by his mother.

Lee McGowan testified, for the defense, that a certain sow given to the defendant by his mother, had pigs in February, 1887, and about a month later the sow and pigs disappeared. Witness passed them in the bottom in October, 1887, and he and defendant went to the bottom, caught the pigs and took them home in a wagon. The said pigs were with the defendant's sow and, the witness was confident, were the property of defendant. They were claimed and taken openly by him in daytime. Dickie afterwards came to defendant's house and claimed and took the said pigs.

Peter Oliphint testified, for the defense, that he was riding past the field of defendant one day in November, 1887, when he saw and heard defendant and Dickie, in defendant's field, engaged in an angry dispute about hogs. Dickie called to witness to settle the matter—the matter in dispute being the

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claim of each to some hogs. Witness then asked defendant how many and what kind of hogs were in dispute. Defendant replied that he and Dickie each claimed three certain shoats. Dickie was threatening to whip defendant unless he surrendered the animals. It was agreed to leave the dispute to witness, and witness said to defendant: "As Dickie is determined to whip you or have the hogs, I believe if I were you I would let him have them rather than fight him, for it will cost you more to pay for fighting than the shoats are worth." Defendant then said: "As we agreed to leave it to you, and you say I had better give up the hogs, I will do so, although I believe they are mine." Dickie then took the hogs home.

Abercrombie & Randolph, for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for theft of hogs, with imprisonment in jail twenty-four hours and a fine of ten dollars as the punishment.

The hogs were alleged to be the property of M. G. Dickie. The evidence leaves the issue, as to whether the hogs belonged to Dickie or the defendant, quite evenly balanced. But, concede that they were the property of Dickie, the proof fails to show the fraudulent intent. On the contrary, the facts clearly present a case in which the defendant, if not the owner of the hogs, certainly believed himself to be, and took them so believing.

The verdict is not supported by the evidence, and for this reason the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered February 2, 1889.

No. 2642.

J. H. LEONARD *v.* THE STATE.

AGGRAVATED ASSAULT AND BATTERY—FACT CASE.—A husband has the right to defend himself against an assault committed upon him by his wife, and, unless he employs greater force than is necessary to repel the violence of his wife, he can not be held guilty of an assault and battery. See the opinion for the substance of evidence *held* insufficient to support a conviction for aggravated assault and battery by a husband on his wife.

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Opinion of the court.

APPEAL from the County Court of Houston. Tried below before W. A. Davis, County Judge.

The conviction was for aggravated assault and battery, and the penalty assessed against the appellant was a fine of twenty-five dollars.

The opinion summarizes the evidence in the case.

W. A. Stewart, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Appellant was convicted of an aggravated assault and battery upon his wife. Mary Riley, step-daughter of defendant, states that she and defendant were in the field, about one hundred yards from the defendant's house; that defendant was whipping her with a switch; that, while being whipped, her mother came running down to them, appearing to be very angry. Defendant told her to leave and not interfere with him, but she refused and defendant and Mrs. Leonard got together; that she saw him strike her twice with the switch.

Mrs. Leonard states "that she went down to the field where defendant was; that she was very angry; that she has quite a high temper—hard for her to control. Defendant asked her to go to the house and she refused; that she struck defendant; did not know whether he struck her or not; that he did not hurt her if he struck her."

Now there may not be much gallantry or chivalry in repelling with force assaults made by the wife, still, at law, a husband has the right to defend himself even against attacks of his wife; and unless greater force is used than is necessary to repel the violence, he would not be guilty of an assault or battery. In this case the wife was the aggressor, it not being shown that appellant was in the wrong in chastising the girl, and the force used by him was very slight indeed.

We are of opinion that the facts fail to show an assault or battery; that the force used was to repel the violence used upon him by the wife, and was not greater than was necessary.

Reversed and remanded.

Opinion delivered February 2, 1889.

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No. 2665.

SUSANO CASTILLO *v.* THE STATE.

HORSE THEFT—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction for horse theft.

APPEAL from the District Court of Webb. Tried below before the Hon. J. C. Russell.

The conviction in this case was for the theft of a horse, the property of Alejandro Guzman, and the penalty assessed against the appellant was a term of five years in the penitentiary.

Alejandro Guzman was the first witness for the State. He testified that he lived at his ranch near the Aguelares depot, in Encinal county, Texas. On December 20, 1887, he loaned a mare to Mrs. Paula Orosco, for the purpose of sending Ramon Alexander to Laredo after provisions. The mare was to have been returned in three days. Neither Mrs. Orosco nor Ramon Alexander ever returned the mare. The mare was reported to have been stolen from a field near Laredo. In consequence of a letter he received from Mrs. Orosco, the witness went to the place of Mateo Salazar, in Webb county, and received the animal from the hands of Salazar. This was on the ninth day of April, 1888. Between December 20, 1887, and April 9, 1888, the witness twice saw the defendant, but on neither occasion did defendant say anything to him about the mare.

On cross examination, this witness testified as follows: "About January 4, 1888, I made an arrangement with Mrs. Orosco about the mare. The arrangement was that if the mare did not turn up, she was to pay me twelve dollars if she could, and if she could not, then she was to pay me nothing. No time was set when she was to pay. If she had paid the twelve dollars by April 1, it would have been her mare, and I would have had no right to claim it. I testified in a justice's court that if she had the money, she was to pay in March. I began to look for the mare on April 9. I did not look for her before that time. I had not sold the mare to Mrs. Orosco. I had agreed

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to take twelve dollars if the mare did not turn up, but was to claim it if it did turn up. If Mrs. Orosco had paid the twelve dollars by April 9, I would not have claimed the mare."

Ramon Alexander testified, for the State, that he was the son of Mrs. Orosco and the nephew of defendant. Mrs. Orosco sent witness to Laredo, on Guzman's mare, to get provisions. On reaching Laredo, the witness, as he customarily did, went to the defendant's house to stop. On his arrival at defendant's house, defendant told a man to take the mare to a field. Three days afterward defendant told witness that the mare had been stolen. Witness did not then tell defendant whose mare it was, but defendant must have often seen the animal at Guzman's ranch and must have known it. Defendant designated no particular field when he sent the mare off. The witness had frequently stopped at defendant's house, and on such occasions his horse was generally sent to Marcella Garcia's field. The witness did not consent for defendant to sell the mare.

Mrs. Paula Orosco testified, for the State, that she borrowed the mare from Guzman, and sent her son, Ramon Alexander, to Laredo, to be gone three days. She never afterwards saw the animal. In April, 1888, a boy told witness that he saw the mare at defendant's house, in possession of a son of Mateo Salazar, and she wrote Guzman to go and get the animal. Witness never gave defendant authority to sell the mare.

Cross examined, the witness said that, on January 4, 1888, she and Guzman met at defendant's house in Laredo, and she then told Guzman that, as she was responsible for the loss of the animal, she would pay him for it. Guzman said he would settle the matter for twelve dollars. The witness could not say that defendant knew about that arrangement, but his wife was present when it was made. Under the said arrangement witness was to pay for the animal in instalments, but if it "turned up" then she was not to pay for it. Defendant, who was the witness's son-in-law, was authorized to sell any property belonging to the witness. He had no authority to sell the mare, because witness had not paid for it. Defendant never informed witness that he had found and sold, or otherwise disposed of, the animal.

Mateo Salazar testified, for the State, that he bought the Guzman mare from defendant, in Laredo, about the middle of February. Defendant said that the animal belonged to his

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mother-in-law. Guzman afterwards claimed and took the animal, J. Y. Sanchez being present at the time.

The State closed.

Deputy Sheriff J. Y. Sanchez testified, for the defense, that he arrested defendant on the charge of stealing the Guzman mare. When arrested, defendant told witness that he thought he had a right to sell the mare, because his mother-in-law had paid or was to pay for the animal.

The wife of the defendant testified, in his behalf, that she was present on January 4, 1888, and heard the arrangement between Guzman and Mrs. Orosco about the mare. She informed the defendant of that arrangement some time before defendant sold the animal to Salazar.

Nicholson & Dodd, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for theft of a horse. We have very carefully examined the facts of this case, and are of opinion that they do not support the conviction, and we are not willing to sanction it, believing that to do so would be dangerous to the liberty of the citizen. The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Opinion delivered February 2, 1889.

No. 2628.

CLABE ELLIS *v.* THE STATE.

1. JURY LAW—VERDICT.—In misdemeanor cases a jury may be permitted, by the court, to separate, as provided by article 688 of the Code of Criminal Procedure, but this rule does not authorize the court to reconvene a jury after it has been finally discharged, in order to remedy an informality in a verdict rendered by it, or to return another verdict.

2. THEFT—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction for hog theft.

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Opinion of the court.

APPEAL from the County Court of Houston. Tried below before the Hon. W. A. Davis, County Judge.

The conviction was for the theft of a hog, the property of S. C. Bitner.

The opinion states the facts relative to the verdict.

Stated briefly, the State's proof shows that Bitner's certain white hog, weighing between ninety and one hundred pounds, disappeared on or about February 16, 1888. Bitner did not know whether his said hog was dead or alive, or whether it had estrayed or had been stolen. Two or three witnesses for the State testified that defendant owned a white sow and two white shoats, but if he owned such a white hog as the animal described by Bitner, they did not know it.

The principal witness for the State testified that he heard a shot fired in defendant's field on the morning of February 17, 1888. Going to that point he found the body of a hog that had just been shot, presumably by the defendant, who about that time left the said place and afterwards claimed the hog to be his property. The ears had been freshly removed from the hog when witness reached it. It was a white hog and would weigh between ninety and a hundred pounds. The body of the hog was gone when witness returned to the field on the next day, and the "drag" pointed towards defendant's house.

The defendant's wife and daughter testified, in his behalf, that the white hog killed by defendant in his field on February 17, 1888, belonged to him, defendant.

Cooper & Moore, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant was tried for the theft of a hog of the value of six dollars. He was found guilty by the jury and the verdict returned by them was, "we, the jury, find the defendant guilty and assess his fine at five dollars." The jury were then discharged by the court; they left the court house and dispersed. In about five minutes afterwards it was discovered that the verdict was fatally defective in that they did not assess some imprisonment in the county jail as part of the punishment, as is required by the statute in cases of theft of hogs if the value be under twenty dollars. (Penal Code,

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art. 748.) Discovering the error the court had the jury recalled and reconvened in the court room, and, over objections of defendant, verbally instructed them that they would have to find imprisonment in the county jail as part of the punishment, and directed them to retire again and consider of their verdict; which they did, and afterwards returned a second verdict as follows: "We, the jury, find the defendant guilty and assess his punishment at a fine of $2.50 and one day in the county jail;" which verdict was received by the court and judgment rendered in accordance therewith.

In misdemeanor cases, whilst it is true that a court may in its discretion permit a jury before verdict to separate (Code Crim. Proc., art. 688), we know of no authority which a court has to discharge a jury finally after they have returned a verdict, no matter how informal and illegal, and have been permitted to separate, to recall and reconvene them again that they may retire and find another and distinct verdict in the case.

"If the jury find a verdict which is informal their attention shall be called to it, and with their consent the verdict may, under the direction of the court, be reduced to proper form." (Code Crim. Proc., art. 715.) But this, we apprehend, can not be done after they have once been discharged and permitted to leave the court room and become separated, and had opportunity to intermingle and converse with outsiders about the case.

But, aside from this error, we are of opinion the judgment in this case should be reversed because the evidence is wholly insufficient to support it. There is no evidence establishing the allegation in the indictment that defendant stole a hog, the property of S. C. Bitner, if, indeed, it raises a presumption that he stole the hog of any one.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered February 2, 1889.

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No. 2681.

JEFF BRISCOE v. THE STATE.

PRACTICE—BILL OF EXCEPTION.—In this case the trial court charged upon an issue depending upon the evidence. The defendant excepted to the charge because it was unwarranted by any evidence in the case. In his authentication of the bill of exceptions, the trial judge recites that there was no such evidence adduced on the trial, and that the evidence referred to in the charge was evidence adduced on the trial of another case. The statement of facts does contain evidence which would warrant the charge, but, as the bill of exceptions controls, the charge must be held erroneous as unauthorized by any evidence on the trial.

APPEAL from the District Court of Falls. Tried below before the Hon. Eugene Williams.

This conviction was for the theft of a horse, and the penalty assessed against the appellant was a term of five years in the penitentiary.

The question involved in this appeal does not necessitate a statement of the evidence.

J. T. Martin and *J. D. Oltorf* for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. In the charge of the court the jury were instructed as follows: "Evidence has been introduced of the loss of other animals from the range about the time this mare in question was missing therefrom. You will consider the loss of other animals from the range only so far as this evidence may tend to develop the transactions out of which this prosecution has grown, and may tend in your opinion to identify the mare in question." This instruction was excepted to by the defendant upon the ground that it was unwarranted by any evidence adduced on the trial, and the bill of exception, duly authenticated by the trial judge, recites that there was no such evidence in the case, but that the evidence referred to in said charge was evidence which had been introduced in the trial of another cause before said court.

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Statement of the case.

In the statement of facts there appears evidence which would warrant the charge excepted to, but, as the bill of exception expressly states that no such evidence was adduced on the trial, such statement must control, and we must hold that there was no evidence to warrant the charge. (Willson's Cr. Stat., sec. 2369.) There being no evidence to warrant such charge it was error to give it. (Willson's Cr. Stat., sec. 2337.) And the error having been excepted to, the conviction must be set aside, although the error may have been harmless. (Willson's Cr. Stat., sec. 2363.) The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered February 9, 1889.

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No. 2542.

CHARLES MEDIS AND ED HILL *v.* THE STATE.

1. JOINT OFFENDERS—CASES APPROVED—A VERDICT against joint offenders on a joint trial, to be valid, must assess a separate penalty against each offender. Flynn v. The State, 8 Texas Ct. App., 389, and Matlock et al. v. The State, 25 Id., 716, and Cunningham v. The State, 26 Id., 83, approved.
2. SODOMY—ACCOMPLICE TESTIMONY—CHARGE OF THE COURT.—The rule that, in rape cases, requires that if the other proof in the case tends to raise the issue of the female's consent to the carnal act, she becomes so far an accomplice that, in order to warrant a conviction based upon her testimony, she must be corroborated, applies to sodomy cases; and if the evidence tends to show the consent of the prosecuting witness to the act of beastiality committed upon him, he must be corroborated. The proof in this case tends strongly to show the consent of the alleged injured party, who, upon the main issue, was the State's principal witness; and in failing to instruct the jury with regard to the corroboration of an accomplice, the trial court erred.

APPEAL from the Criminal District Court of Galveston. Tried below before the Hon. Gustave Cook.

The conviction was for sodomy, alleged to have been committed upon one Milton Werner. The verdict reads as follows: "We, the jury, find Chas. Medis and Ed Hill guilty as charged

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of sodomy, and assess the punishment at ten years confinement in the penitentiary."

The details of the transaction involved in this prosecution are too foul and disgusting to be recorded even in a report of judicial proceedings. It is enough for the purpose of this report to observe that the prosecuting witness Werner was the only witness who testified to the fact of the penetration of his person by each of the appellants, or who inculpated Hill in the actual performance of the revolting act. Two other witnesses, however, testified that they discovered the appellant Medis and the State's witness Werner in flagrante delicto, with the appellant Hill lying within six feet of them, reading a newspaper. After watching the parties a few minutes they entered the room, and the parties separated. Medis first denied and then admitted the beastial act. About the time they discovered the parties, they heard the prosecuting witness say that he was to be served next. They stated further that when they charged the parties with the act of sodomy, the prosecuting witness answered that he "did not care a d—n."

McLemore & Campbell and *S. T. Fontaine,* for the appellants.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE The appellants were jointly indicted, tried and convicted of sodomy, the verdict of the jury being: "We, the jury, find Charles Medis and Ed Hill guilty as charged, of sodomy, and assess the punishment at ten years confinement in the penitentiary."

Appellants contend by their counsel that this is not a good or legal verdict. This proposition is now well settled in favor of appellants. (Flynn et al. v. The State, 8 Texas Ct. App., 398; Matlock et al. v. The State, 25 Texas Ct. App., 716; Cunningham v. The State, 26 Texas Ct. App., 83; 4 Ark., 430; 16 Ark., 37.)

Appellants were charged with committing the act upon one Milton Werner. Upon the trial Werner was introduced as a witness for the State, and his testimony was relied on for a conviction. The court failed to give instructions to the jury relating to the necessity of corroborating said witness—counsel for appellants contending that Werner was consenting, and

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was therefore an accomplice. Upon this subject, says Bishop: "When this offense is committed on a non consenting person who becomes a witness, it appears that his early complaint may be shown in corroboration. the same as those of the injured woman in rape. If such person had consented, he would be an accomplice whose testimony would for this reason need corroboration." (2 Crim. Law, 1018.)

Werner was evidently consenting; but if the evidence should leave this in doubt, it would then become a question for the jury, and not the court, to determine under the proper instructions, whether the person was or was not consenting, and the jury should in such a case be instructed that if they found that he was consenting, then they must find that he was corroborated.

Reversed and remanded.

Opinion delivered February 9, 1889.

No. 2538.

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CHARLES SMITH v. THE STATE.

THEFT—ACCOMPLICE TESTIMONY—FACT CASE.—A conviction based upon the uncorroborated testimony of an accomplice can not stand. See the statement of the case for the substance of evidence *held* insufficient to support a conviction for hog theft.

APPEAL from the County Court of Leon. Tried below before the Hon. H. B. Pruitt, County Judge.

The conviction was for the tneft of Utsey's hog, and the penalty assessed was a fine of one dollar and imprisonment in the county jail for one day.

The substance of the testimony of the prosecuting witness Clements was that he and his family occupied a tent on the place of the defendant, about one hundred yards from defendant's house. On the morning of November 27, 1887, defendant sent for the witness to kill a hog for him. Witness went to defendant's house and defendant pointed out to him a certain black and white sow, wearing a bell. Witness shot and killed

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the sow at defendant's crib. Smith almost immediately fled into the house. The witness then discovered three men riding along the road, and, as it was raining, he went into the house to prevent his gun from getting wet. He and defendant afterwards went to the crib, and the defendant covered up the body of the hog with some potato vines. Witness then asked defendant whose hog he had killed, and defendant replied that it belonged to old man Utsey. Witness on the same day helped defendant butcher the carcass and bury the entrails in two holes dug behind the crib. He afterwards purchased one-half of the meat from defendant. The defendant secreted the bell in the shuck bin. It was afterwards turned over to constable Linson. About two or three days after the killing of the hog the witness went to old man Utsey and told him that he had killed the sow by direction of the defendant. This witness declared that he did not know who owned the animal until told by defendant soon after the killing.

Utsey testified, for the State, that about a week after the alleged killing of the sow, William Clements came to his house and told him that, by direction of defendant, he had killed a sow which corresponded with the witness's animal. Witness then summoned Constable Linson, and Clements guided them to a place where some hog entrails were buried, and from among some shucks in the crib loft produced the bell which he said was on the sow's neck when killed, and which was on the witness's sow when the witness last saw her, a day or two before the alleged killing. Since that time the witness had not seen the sow. He knew nothing whatever about the killing of the animal except what he was told by Clements.

W. M. Johnston and *J. J. Dotson*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for theft of a hog, with penalty fixed at a fine of one dollar and one day's imprisonment.

On the trial the State introduced one William Clements as a witness, by whom a very clear case of theft was shown against the appellant, but this witness is not corroborated in such manner as is required by law. The facts sworn to by the other witnesses do not tend to connect appellant with the theft of

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Syllabus.

the hog. They tend to show that some one had stolen Utsey's hog, but point to no particular person as being the thief. Clement's evidence, who was evidently an accomplice, if not the only thief in this transaction, alone directs the criminative facts towards appellant. It is Clements who gives direction to the criminative facts, which show a theft by some person, by connecting appellant with these; whereas, without his testimony they would point to no person with certainty, and to Clements as unerringly as to any other person, if not with greater certainty.

The accomplice, Clements, not being corroborated, the verdict is not supported by the testimony, and therefore the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered February 9, 1889.

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No. 2662.

MACK CROOK *v.* THE STATE.

1. ACCOMPLICE TO MURDER—INDICTMENT.—See the opinion in extenso for the charging part of an indictment *held* to comprehend but a single count, and to be sufficient to charge the accused as an accomplice to murder.

2. SAME—EVIDENCE—PRINCIPAL OFFENDERS—CHARGE OF THE COURT. In order to authorize the conviction of an accused, as an accomplice, it devolves upon the State to establish the guilt of the principal of the offense charged against him; and, to establish that specific issue (but not that the accused is an accomplice), any evidence is admissible that would be competent against the principal if on trial. Under this rule the trial court did not err in admitting proof of the confession of the principal; and, in limiting the purpose of such proof to the issue of the principal's guilt, the charge of the court was correct.

3. SAME—PRACTICE—EVIDENCE—DECLARATIONS.—The State's witness Holman testified on the trial of the accused as an accomplice to murder, to the acts, declarations and statements of one Harris, and to a conversation between him, the witness, the said Harris, and the alleged principal, to all of which the accused objected upon the ground that he was not present at any of the times testified about, and that it had not been shown that a conspiracy to commit murder existed between him and the said parties. *Held* that this proof in this case was clearly hearsay, and was inadmissible except upon the predicate of the

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existence of such a conspiracy. Whether the proof sufficiently established the predicate was, primarily, a question to be determined by the court; but, the evidence clearly presenting the sufficiency of the predicate as an issue in the case, the trial court erred in failing to submit that issue to the jury, with instructions to disregard the evidence admitted unless the predicate was established by other proof. In the same connection the court should have instructed the jury that a conspiracy can not be established by the acts or declarations of a co-conspirator, made after the consummation of the offense and in the absence of the defendant. See the opinion for a special charge on the subject, which, being correct and demanded by the proof, was erroneously refused.

4. SAME—PRACTICE.—Expressions of the trial judge, in the presence of the jury, with reference to the cogency of the evidence, if prejudicial to the defendant, and exception is promptly reserved, constitute cause for reversal. Pending the discussion in the presence of the jury, of the admissibility in evidence of the declarations of an alleged co-conspirator, the trial judge interjected questions to counsel which clearly intimated that, in his opinion, a conspiracy had been sufficiently established to admit the evidence; to which action of the judge the defendant promptly excepted. *Held*, material error. The jury should have been retired pending the discussion and the ruling on the question.

5. SAME.—A prosecuting witness having testified to certain inculpatory facts, the defense sought to impeach him by proving that he had made statements contradictory of his testimony on the trial. Thereupon, over objection by the defense, the State was permitted to introduce evidence in support of the good general reputation of the witness for truth and veracity. *Held*, that the action of the court was correct, especially in view of the showing that the impugned witness was a stranger in the county of the trial.

6. SAME—EVIDENCE—PREDICATE.—As a predicate for the introduction in evidence of the written testimony of one T., as delivered at the examining trial, it was proved that the said T. resided in the Indian Territory at the time of the examining trial and at the time of this trial. *Held* that the predicate was sufficiently established.

7. SAME.—The defense offered to prove by the witness N. the statement made to him by an one D. to the effect that the gun with which it was claimed by the State the killing was done was found by D. at a certain place, which proof, upon objection by the State, was excluded as hearsay. *Held* that the ruling was correct.

8. MURDER—ASSAULT AND BATTERY—CHARGE OF THE COURT.—The act of killing, in this case, necessarily included an assault and battery, and the charge of the court defining murder sufficiently embraced assault and battery, but the trial court, in addition, gave in charge an independent definition of assault and battery. *Held* material error because excepted to. Moreover it was matter calculated only to encumber the charge and confuse the jury.

9. SAME—"MALICE"—"MALICE AFORETHOUGHT"—"EXPRESS MALICE."

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—A charge of the court in a trial for murder which omits to define the terms "malice" and "malice aforethought"—essential elements of murder—is fundamentally erroneous, and such error is not cured by a definition of "express malice."

10. SAME—"EXPRESS MALICE."—The charge of the court defined express malice to be "where one with a calm, sedate and deliberate mind and formed design kills another," etc. *Held*, erroneous, because it omits to qualify the act as an *unlawful* killing.
11. SAME—ALIBI.—Upon the defense of alibi as applied to the alleged principal, the charge of the court required the jury to believe that the alleged principal was not present at the time and place of the killing. *Held* error, because the effect of such charge was to eliminate from the defense of alibi the doctrine of reasonable doubt.
12. SAME—ACCOMPLICE TO MURDER—VERDICT.—While not essential, it was proper that the charge of the court should instruct the jury as to the forms of the verdict they could return in this case. The form of the verdict, in the event of conviction, as prescribed by the charge in this case was as follows: "We, the jury, find the defendant Mack Crook guilty as an accomplice to murder of the first degree in the killing and murdering of James H. Black, as charged in the indictment," etc. *Held*, correct.
13. SAME.—ACCOMPLICE TO CRIME is a distinct offense, especially defined by our code, and punished in the same manner as the principal offender. Note that Hurt, Judge, dissents from this ruling, and maintains that being an accomplice to a crime is not a specific offense, and that the accomplice is guilty of the offense committed by the principal.

APPEAL from the District Court of Grayson, on change of venue from Lamar. Tried below before A. C. Turner, Esq., Special Judge.

The indictment in this case charges the murder of James H. Black by John Middleton, in Lamar county, Texas, on the sixteenth day of November, 1884, and that the appellant and one Newt Harris were accomplices to the said murder of Black by the said Middleton; the particular acts charged against them being that they did, on the twelfth day of November, 1884, advise and encourage the said Middleton to kill and murder the said Black, and that they did prepare and furnish to the said Middleton a certain gun with which to kill and murder the said Black, and that they were not present at the time of the killing of the said Black. The venue of the cause was changed by the court of its own motion to Grayson county, Texas, in the district court of which county, on the nineteenth day of November, 1888, the appellant was placed upon his separate trial. His trial resulted in conviction as an accomplice to murder of

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the first degree, and his punishment was assessed at a life term in the penitentiary.

Sam Strawther was the first witness for the State. He testified that he lived in Paris, Lamar county, Texas, in 1884. The defendant was sheriff of Lamar county in 1883 and 1884, and was a candidate at the Democratic primary election in August, 1884. for renomination, but was defeated by James H. Black, the deceased, his only contestant for the said nomination. He then announced himself as a candidate before the people for re-election to the office of sheriff, and at the ensuing November election was defeated at the ballot box by the deceased, the nominee of the Democratic primaries. Newt Harris, J. M. Yates and Lewis Holman were deputy sheriffs under the defendant during his term of office. Harris was also jailor and had the custody of the jail keys, and with his family resided in the residence part of the jail building. The said Harris is now dead.

Doctor Haden testified. for the State, that he lived in Paris, Texas, and was county physician of Lamar county during the year 1884. As such physician he attended John Middleton, who was then confined in the Lamar county jail on a charge of horse theft. Middleton was suffering from an acute attack of diarrhœa, and some time prior to September 23, 1884, the witness, apprehending danger to his life by continued confinement in the cells, advised his removal to the residence portion of the jail, and procured an order for such removal from County Judge Moore. Newt Harris was then the deputy sheriff in charge of the jail, and he and his wife, who resided in the jail, waited on the said Middleton after his removal from the cell to an upstairs room. The witness last saw Middleton when he went to the jail to attend him on September 23, 1884. When he went to see him on the next day he learned that he, Middleton, had effected his escape on the preceding night. Prior to the removal of Middleton from the cell to the upstairs room, Jailor Harris expressed to witness his opinion that Middleton would die if kept in the cell, in which opinion the witness concurred. Harris then said that he thought Middleton ought to be removed to and guarded in the upstairs rooms, and the witness agreed with him.

Cross examined, the witness said that he procured the order for the removal of Middleton from the cell to the upstairs room under the belief that longer confinement in the cell was

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perilous to his life. He had no idea that Middleton would or could attempt to escape, when he advised his removal. On the contrary, when, on the morning of September 23, 1884, Deputy Sheriff Yates told witness that the defendant was fearful that Middleton would escape, and wanted him returned to the cell, the witness replied that he did not think it physically possible for Middleton to get away, but that, if defendant feared the escape of Middleton, he had better return him to his cell, though his recovery would be greatly retarded by so doing. Defendant went to Sherman on that day in pursuit of a man accused of an offense.

Mrs. Ella Black, the widow of the deceased, testified for the state, that her husband was killed about seven o'clock on the night of November 16, 1884. He was killed by a gunshot, at his house in Blossom Prairie, Lamar county, Texas—the said Blossom Prairie being a small town on the railway about ten miles east of Paris. The house occupied by the deceased, witness and their children was situated on the north side of the railroad and near the depot. It was a double box house of two rooms, with a stack chimney between the rooms. It fronted south, and had a south door in each room. The west room was the one occupied as the family room. The children's bed was across the door at the south side of the house. A lamp was burning in the said west room at the time of the assassination. At about seven o'clock on the night of November 16, 1884, the said night being dark according to the recollection of the witness, some person called "hello!" at the gate. Deceased passed through the partition door to the south door of the east room, and some person asked: "Is Mr. Black in?" Deceased replied: "Yes." A shot was immediately fired, and deceased returned to the west room, sank to the floor, near the bedstead, and expired immediately, without having uttered a syllable. The witness did not see the shot fired, nor did she know who fired it.

H. L. Byrn testified, for the State, that he lived at Blossom Prairie in 1884, in a house quite near the house of the deceased. The contest for sheriff of Lamar county, at the election of 1884, between the defendant and the deceased was a very exciting and bitter one. It produced a hostile feeling between the two candidates which culminated in a personal encounter between them in Faught's drug store, in Blossom Prairie. The witness was not positive as to the date of the encounter, but thought it

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occurred after the struggle at the primary election for the nomination, and he knew that it occurred before the general election. He did not witness the encounter, which only amounted to a fist fight, being engaged in his store at the time, but he understood that it grew out of a statement during the canvass imputed to the deceased. The witness was at his home on the fatal night, and heard the fatal shot fired. He went at once to the house of deceased, who was dead when he arrived. He had been shot in the breast, and several shot had entered the door facing on the east side of the east room. Other parties soon reached the house of deceased, when the witness, accompanied by Mr. Cooper, procured a lantern and proceeded to look for tracks. He found the tracks of a horse near the front gate, immediately in front of the house. The said tracks showed that the horse sprang forward at that point, whence it continued in a run. The said tracks showed that horse to have been a medium sized animal. At another point, about fifteen steps from the gate, the witness found the tracks of another horse. The tracks of the two horses came together at a point about thirty five yards distant from the gate, and traveled in company as far as the witness was able to trail them. From the gate they went east around the deceased's fence, thence north one block, and thence west. They went, as far as trailed, two and a half miles to a branch, towards Paris, over what was known as the "timbered" road. Witness traced the tracks a second time with W. D. Nelson and others. He then found that the tracks went out Main street a short distance, then left the street, went around through an alley and came back into the Paris and Blossom Prairie road, which they followed to the fork. The left hand at the fork led to Paris by the prairie route, and the right hand to Paris by the timbered road. The tracks took the right hand at that fork. The said road forked again about a mile from the Blossom Prairie depot, the left hand leading to Paris, and the right hand to Shockey prairie, in the direction of Slate shoals, on Red river. The horse tracks took the right hand at the last mentioned fork, where it seemed they left the road, and witness trailed no further. Others of the party followed the said road a short distance further, but lost the tracks. The country where the witness lost the trail was covered with black jack and post oak brush. The witness was not acquainted with, and, so far as he knew, had never seen either John or Jap Middleton.

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Cross examined, the witness said that he was not present at the fisticuff between defendant and deceased referred to on direct examination, and was not able to state positively whether the public speaking at which it occurred was before or after the primary election. The horse tracks mentioned by witness showed by measurement to be the tracks of two different horses. One of the said horses had a shoe on one of its hind feet. They came together at a point about thirty five yards distant from the house of the deceased, and traveled together as far as the witness trailed them. The tracks of the horses showed that they came into Blossom Prairie by the same road over which they left it. The larger of the tracks were those nearest deceased's gate.

Tom Nichols testified for the State, that he knew the defendant and Newt Harris and John Middleton. He saw John Middleton while he was confined in the Lamar county jail. and once after his escape from the said jail. The time last referred to was between eight and ten o'clock at night, during the progress of one of the Democratic demonstrations which followed the presidential election of November, 1884. On that occasion he passed Middleton at the corner of Lynch's stable, on the block south of the court house in Paris. He did not speak to Middleton, but went on to the White Elephant saloon, at which place Newt Harris was then employed as bar keeper. Newt Harris and Sam Smith, who was in the saloon that night, had some talk about the deceased. The witness did not know the nature of the defendant's feelings for the deceased. The witness supported the defendant for re-election both at the primary and at the polls. Sam Smith, who was a deputy sheriff, also supported the defendant. On his cross examination this witness stated that he and Middleton bowed or nodded to each other as they met and passed on, but did not speak. To Harry Boyd, who was with witness, the witness remarked: "There goes a jail bird," but he said nothing more. Middleton went on towards the court house, in which the Democratic glorification was being held. The witness never told any person about meeting Middleton on that night, although he knew that Middleton was an escaped prisoner. He said nothing about it in his testimony on the habeas corpus trial of Harris, because he was not asked about it. On the said night Middleton was wearing gray colored pants, a dark coat and a dark colored

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slouch hat. At that time Harris was living in the residence part of the jail.

Mrs. Laura Williams testified, for the State, that, in the fall of 1884, she lived on Emberson prairie, nine miles northwest from Paris. John Middleton, whom the witness knew well, came to her house between nine and ten o'clock on the thirteenth day of November, 1884, got his breakfast, had his horse fed and then left, traveling north a short distance, and then east over a road that forked at a point beyond where the witness last saw him, one of which said forks led to Paris, and the other to the river. He was then wearing a gray suit of clothes and a brown slouch hat, and had a black overcoat tied behind his saddle. He was about twenty-eight years old, and wore a mustache about an inch and a half long. He was riding a light sorrel horse with a star or spot in the forehead. The horse was then in medium condition, and was apparently a good animal. His saddle was of yellow leather. Middleton had dark hair. His mustache was of a lighter color than his hair.

Mrs. C. E. Pickard testified, for the State, that in November, 1884, she lived on the Paris and Clarksville road, about three miles east of Paris. She was at home on the night that deceased was killed. She started to the house of Mrs. Mary Hunt, two miles north of her place, between nine and ten o'clock on the morning after the killing, taking her daughter with her, and traveling a neighborhood road. En route the witness's daughter called her attention to a horse, under saddle, standing a short distance off the road. Thinking that perhaps the animal had escaped from some of her neighbors, she walked towards it to examine it. As she approached she observed that the animal was tied to a bush, and about the same time she observed a man stooping down at the root of a tree, from which a faint smoke was ascending. He was looking back at her over his shoulder, his back being towards her. The horse was a bright sorrel animal with a star or blaze in the face. A dark colored overcoat was spread over the saddle, to which was attached what the witness took to be a gun scabbard and a provision bag. The man wore gray colored clothes and a brown slouch hat, somewhat worn. Witness only saw his side face, and was unable to say whether he had a mustache or not. He appeared to be between twenty-five and thirty years of age. Witness remarked to her daughter: "There is a man; I guess

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it is his horse." The man said: "I can't imagine what you are up to." Witness replied that she thought the horse belonged to a neighbor and had escaped, adding: "I suppose it makes no difference." He replied: "It's all right with me if it is with you."

Cross examined, the witness said that she described the man and horse to some gentlemen on the next day, but could not say that Mr. Roland was or was not one of those gentlemen. Something may have been said about the horse belonging to Charley Moore, but witness had no recollection of it. W. D. Nelson, John A. Gose, Mr. Tiernan and Jake Duncan came to witness's house after the arrest of defendant and Harris, and witness pointed out to them the place where she saw the man and horse.

Tom Buckner testified, for the State, that he lived in Paris, and was bar tender in Schilling's saloon in November, 1884. The said saloon belonged to the Schilling brothers and the defendant. The latter, however, had nothing to do with the management of the said saloon. Some time in November, 1884, Jim Simpson, alias "Kicking Jim," who subsequently died in jail, brought Captain Parish's double barreled shot gun to the saloon and left it, remarking that it had been taken from Parish, who was drinking. The gun remained in the saloon several days, standing at times at one end of the counter and at times at the other end. The saloon had the front doors on the west end. The center (counter?) was on the north side of the house, and there was a screen between the outside doors and "the house where the bar was," and there was a screen door between the north wall and the west end of the counter. The witness did not know when nor by whom the gun was taken away. Captain Parish came into the saloon one day, while sober, and recognized the gun, and requested witness to take care of it for him.

L. B. Enlow testified, for the State, that he lived in Delta county, Texas. He was in Paris purchasing goods on the eleventh day of November, 1884. He and C. D. Rogers went to Schilling's saloon between ten and eleven o'clock on that night and got into a conversation with Henry Schilling while standing at the stove, which was some distance from the front of the house. While thus engaged the witness saw a man reach his hand through the screen door and attempt to seize a gun. He failed in that effort and appeared to be watching the witness.

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Witness then turned his head as though not observing the man, when he thrust his hand through the door a second time and got the gun. The witness then called the attention of Henry Schilling and Rogers to the fact that the man had taken the gun. Fifteen or twenty minutes later the man who got the gun came into the saloon where witness was, and the witness learned that his name was Mack Crook. That man was the defendant. When removed, the gun was at the west end of the counter, next to the screen leaning against the shelving.

This witness, on his cross examination, stated that he was at the depot in Paris on the day in 1886 when the witnesses in this case went to Sherman. He was drinking on that day, but had no recollection of drinking with the defendant. He had no recollection of saying on that day, in the presence of Andy Gray, J. B. Belcher and Sam Smith, that Mack Crook was not the man he saw take the gun from Schilling's saloon. If he made any such statement it was not true. The witness remembered nothing that occurred at the depot, except that he had a "little row" and a "tussle" with a policeman, who took a pistol away from him.

C. D. Rogers testified, for the State, that he was in Schilling's saloon with the witness Enlow on the night referred to by Enlow. Enlow called witness's attention to a man who, he said, was trying to take a gun through the screen door from behind the saloon counter. Witness saw no effort by anybody to remove a gun, but saw, through the slats of the screen, the outlines of a man in the front part of the house. Some minutes afterwards that man came into the saloon, and Enlow remarked: "That is the man who got the gun." The witness did not know that man, and could not identify the defendant as that man.

Lewis Crook testified, for the State, that his brother, the defendant, was in Hot Springs, Arkansas, at the time the deceased was killed. Witness telegraphed him that the deceased had been killed by unknown parties, and he returned to Paris by the next train.

Sam Strawther, recalled by the State, testified that Lewis Holman went home with him to tea on the fatal night. Early in the night Newt Harris came to witness's house after Holman. He said that he had just received a telephone message from Blossom Prairie to the effect that the deceased was killed; and he and Holman left witness's house together. A day or two before the arrest of the defendant and Harris, the defendant

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came to witness and asked witness if his son-in-law Jim Goodjoin or Lewis Holman were in town. Witness replied that Goodjoin was in town unless he had left within a very short time. He then said: "If you see Goodjoin, tell him to tell Lewis Holman to come to town, as I want to see him." Goodjoin at that time was merchandising on Emberson prairie, and Holman was in his employ.

James Goodjoin testified, for the State, that Lewis Holman was a deputy sheriff under the defendant. He went out of office with his chief, and entered the service of the witness, who was a merchant on the Emberson prairie. A few days before the arrest of the defendant the witness met the defendant in Paris, when defendant asked the witness if Holman was at his store. Witness replied that he was, and defendant requested witness to tell Holman to come to Paris to see him, and to come prepared for an absence of at least ten days. He left the impression on the mind of the witness that he wanted Holman to help him get up some cattle. Witness delivered the message, and Holman went to Paris, and was not again seen by the witness until after his arrest.

Frank Morris testified, for the State, that some time between the primary and general election in 1884, he heard the defendant, speaking of deceased, say: "I will bet five hundred dollars that the d—d son of a bitch will never be sheriff of Lamar county."

J. M. Yates was the next witness for the State. He testified that he was a deputy sheriff under the defendant in 1884. He was office deputy in November, and from September until the close of defendant's term, was jailer. John Middleton escaped from custody on the night of September 23, 1884. The defendant was at that time in Sherman, and Jim Crook and Newt Harris were on the river with a prisoner in custody. Defendant was not in Paris when Middleton was removed from the cell to the upper room in the jail. As he was leaving for Sherman on the morning of September 23, the witness spoke to him about the removal of Middleton from the cell. He appeared to be angry about it, and directed witness to ask Doctor Haden if Middleton could not be returned to the cell. He said he "did not want any d—d horse thief to get away from him." The witness saw Doctor Haden about the matter. The doctor objected, and said that, though the man had better be returned to the cell if there was danger of his escape, he did not believe

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that he could survive re-incarceration in the cell. When Harris left Paris on that morning he delivered the jail keys to the witness, and it was on the night of that day that Middleton escaped. Witness wanted to remain at the jail that night, but Mrs. Harris objected, and he went off. On the return of Harris to Paris. the witness sent him to Red river in pursuit of Middleton, but he failed to find him. The defendant soon returned from Sherman, and went immediately to Bonham, where, he said, he heard of a man whom he thought might be Middleton. Returning from Bonham unsuccessful, he went to Red river, in the neighborhood in which Middleton's relatives lived.

Continuing his testimony, this witness said that he remained in the sheriff's office until Sheriff Gunn qualified, after the death of deceased. Deceased came to Paris to qualify on Saturday—the day before he was killed—but a formal defect being found in his bond, he postponed assuming charge. He, however, went through the office and inspected the jail, told witness that he would take charge on Monday, and requested him to retain a deputyship until he familiarized himself with his duties. Defendant went to Hot Springs, Arkansas, on the Tuesday or Wednesday preceding the fatal Sunday night. He went to the Indian Territory a few days before that, in pursuit of a criminal. Witness knew nothing of his visiting the house of Threlkeld in the Nation on that trip. Lewis Holman was the first person to inform the witness about the killing of deceased. A short time after the killing of Black a letter addressed to the sheriff of Lamar county was received—defendant at that time being absent. The envelope enclosed two letters, one addressed to the defendant and one to Harris. Witness delivered the two letters to Harris, and on the return of defendant told him that Harris had the letters, but had no other talk with him about the letters. The said letters were signed either "Cross" or "Collins," and came from Briarton, Indian Territory. On or about February 10, 1885, the witness received a letter addressed to him, post marked and addressed from Wamego, Kansas, and signed "John Howard." After reading the said letter, and finding it to refer to the killing of Black, the witness became afraid that it would involve him in trouble. Acting upon that fear, he took the letter to Schilling's saloon, where he found the defendant, and he and defendant read the letter and discussed it, after which the witness burned

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it. As soon as he read the letter the defendant said: "That d—d fellow has been writing to this country for some time; they will get him; he will give the whole thing away, and then I will have trouble." The witness understood the letter to be from John Middleton when he spoke of "that d—d fellow," though he could not now say that Middleton's name was mentioned in the conversation. The witness asked defendant what he should do about the letter. He first advised that no attention be paid to it, but upon reflection concluded that the witness had better answer it, and so advised.

The witness was able to recall some parts of the letter from Howard. It asked if "old Joe had given him away;" wanted information as to who was sheriff, and if the sheriff was a friend of the defendant. It requested witness to "tell Newt I will send that present soon;" the said present, according to the explanation of the defendant, being a gold watch which, the defendant remarked, he "guessed was stolen by the fellow." Defendant then advised the witness to answer the letter and advise the "fellow" to leave the country and go to Mexico; but to keep track of him. "Old Joe" mentioned in the letter was a negro "trusty," who was under conviction for a felony, and whose case was on appeal. The letter now exhibited in evidence is the letter written by the witness in reply to the said "John Howard" letter. It was mailed by the witness on the train, as advised by the defendant. Some time after this, and before the arrest of defendant and Harris, the witness met the defendant in Schilling's saloon, where he said to witness: "I have got another letter from that d—d fellow." Witness asked him "what fellow?" and he replied: "The same fellow you got the letter from." He then said: "I don't know what to do." Witness asked him what was in the letter, and he replied: "The fellow is writing back here that all of his friends have gone back on him, but one there where he was, that was a friend." Defendant presently said: "I have got to get that d—d fellow out of the way, for if they get him I will have trouble." He then asked witness if he could find the fellow. Witness replied: "I think it will be a hard job. He only had a mustache when he got away, and from all I can hear he now has beard all over his face." Defendant then asked if witness thought Lewis Holman could be relied on. The witness replied that he did not know, and then added: "Mack, I don't want to be mixed up in this affair, for I did not know anything

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about it." Defendant replied: "Yes, this is one thing you did not know anything about." Defendant then asked what the witness was going to do. Witness replied that he wanted to go to his farm and go to work. Witness then said that he wanted to see Holman, and defendant loaned him a horse to go to Goodjoin's store on Emberson prairie for that purpose. He told witness to tell Holman that he wanted to see him, and to come prepared to be absent a week or ten days, which message the witness delivered to Holman. He never saw Holman again until after he, Holman, was arrested. A few days before the killing of Black, the witness met the defendant on the court house steps in Paris, when defendant asked witness if he thought John Middleton had been in the vicinity of Paris since his escape. Witness replied that he thought not; to which the defendant replied: "If he has, it was for a purpose." Witness remarked: "He might try to kill Bill Nelson, as he has threatened to do." Defendant then said to witness: "If you run up on Middleton don't try to arrest him unless you get the advantage, or you might get killed." Defendant appeared anxious and "flustrated" by the Howard letters, and, referring to the last one received by him, remarked: "I will have trouble over this matter, yet." Witness understood this remark to refer to the killing of Black."

The defense, on cross examination, read in evidence the letter addressed to "John Howard, Wamego, Kansas," admitted by the witness to be the letter written by him to John Middleton. It reads as follows:

"*Dear Friend:*

I am just in receipt of a letter from you. Was glad to hear from you. Hope you may soon recover from your afflictions, so you may be able to ride again. You may be assured that I am just as you regard me to be, and am glad you view it in the light as you express yourself. The question of the money you speak of is true, only more so. But I give you no name of the parties; and some persons are working for it and have made some long trips. The party you asked about giving away, he was not the one. He left the country. But I am credibly informed it was some one of your relatives. Do not know which one. I can't say the party is uneasy, but there has been a great deal said. As the next time will soon be here I am looking for another siege of investigation. The citizens

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made up the amount and placed it in the bank (standing.) The party you asked about is no friend, as he was a friend to some one else, and the party is blamed by some people to some extent. Do not go among your relatives, as they are closely watched. I can't advise you to ever come back to Texas, although I would like to see you very much, and would say many things I can't write. I use no names for fear of accident. I have not seen any of the boys you were best acquainted with, for some time, as some people are very curious, you know. You must be on the alert and keep a close watch, or some gal might get away with you. In our correspondence we must use no names. First letters will be sufficient. I hardly know how to do to keep my own folks from knowing we have any correspondence, as they sometimes open my mail, and I assure you I want all this kept very close; and be sure you destroy this as soon as you get it, and I will do the same. If you should ever want to visit Texas, I want you to write me what time and place, so I may see you, though I can't advise you to do so. I think if I was a young man and had no encumbrance I should liketo go to Mexico, although that seems out of the world almost. I believe this is all I can now write. Do not mail your letters where you write from, and use no name unless you want addressed different from this one. Take care of yourself *and be a good boy.*

"Yours forever & etc.

"February 10, 1885. From your friend."

"Write once in a while so I may keep you posted about all the girls, and may be so they may forget the past. *You know.* The principal man you asked about is named Bill Gunn."

Continuing, under cross examination, the witness said that prior to the writing of the above letter he had been told by Lewis Holman that John Middleton killed Black, and that the defendant had nothing to do with it, and had no connection with Middleton in the killing. Defendant had nothing to do with the composition of the letter in evidence, and never read it. It was the individual production of the witness. When writing that letter the witness thought he was writing to the man who killed Black, and that that man was John Middleton. It was on the Saturday after Sheriff Gunn took charge of the jail that Holman told witness about the killing of Black by Middleton. He told witness in that connection that defendant

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had nothing to do with the killing of Black, and knew nothing about it, and that "it was all Newt Harris." The witness never divulged what Holman told him until he was confronted with the letter in evidence which he had written to Howard. On the day he was confronted with his letter, the witness received a note from Sheriff Gunn, inviting him to the office. When he entered the office he found Sheriff Gunn and Jack Duncan, the detective, and was told by them that they had caught John Middleton, who had "given the whole thing away." They then showed witness the letter he had written Middleton. Witness then told Gunn and Duncan all he knew which had been told him by Lewis Holman. It was understood, before the witness testified on the examining trial, that he would not be prosecuted. On the day after he was shown his letter, the witness met Bill Nelson and told him that he was "in it, and did not know whether or not he could swear enough to save himself." The witness had no recollection of telling Jerry Crook and Bill Nelson that defendant knew nothing about the purpose to kill Black. He did tell them that he did not think defendant knew anything about it. He thought then, and thinks yet, that defendant had no knowledge of, nor part in, the plan, and no connection with the murder. Defendant announced a reward of fifty dollars for the capture of Middleton as soon as he learned of his escape. About the time Middleton escaped, defendant and Harris had a falling out, when Harris quit the service of the defendant and went to work for Dave Moore, in the White Elephant saloon.

On re-direct examination the witness stated that that part of the letter in evidence which speaks of money was in answer to inquiries in Howard's letter about a reward being offered for the capture of Black's murderer. That part about parties having made trips was in reply to questions in Howard's letter which spoke of Sheb Williams going to the Indian Territory, and offering a reward of a thousand dollars for the arrest of Middleton. When Jack Duncan showed witness the letter in evidence he remarked that Middleton had confessed, and that witness knew all about the killing of Black. Witness replied: "That is a lie. I know only what I have told you and Mr. Gunn." In fact the witness knew no more, and it was for that reason that he told Nelson that he did not know whether or not he could swear enough to save himself.

Sayton Ashford testified, for the State, that he lived two

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miles west from Blossom Prairie, in Lamar county. About a year after the killing of Black, the witness and Jeff Sisson went cow hunting in the vicinity of Reno, a station on the Texas and Pacific railway, about half way between Paris and Blossom Prairie. At a point about a half or three-quarters of a mile north of Reno, they found an old rusty, muzzle loading shot gun. It was hanging in a black jack tree by a leather strap. Witness did not know who owned the gun nor who hung it in the tree. They took the gun home, and on the next day Sisson and Benton East took it to Paris.

W. H. Roland testified, for the State, that some time after the killing of Black, Jeff Sisson, accompanied by Benton East, brought an old rusty, muzzle loading shot gun to his house in Paris. Witness took that gun to Colonel Cooper's shop. Cooper examined it and then delivered it to sheriff Gunn. Captain Parish afterwards saw the gun and claimed it as his property. On his cross examination the witness stated that he did not recollect testifying as a witness on the inquest upon the body of deceased, nor that on that occasion he described Charley Moore and his certain sorrel horse, or that Mrs. Provine, now Mrs. Pickard, claimed to have seen a man in the woods, on the morning after the killing of Black, who corresponded with the description of Charley Moore, and that he had a horse which corresponded with the description of Charley Moore's horse. Being shown the record of his testimony as delivered upon the inquest, the witness identified his signature and acknowledged it as his testimony. It was then read by the defense as follows: "Charley Moore is about thirty years old, and will weigh about one hundred and fifty pounds. I am reliably informed that Charley Moore left Cavines's on Emberson prairie, ten miles north west of Paris, the day before Black was killed, riding a bright sorrel horse with a star in the forehead. He told parties when he left that he was going to the Nation to buy hogs. He was seen five miles east of Paris, on the Pine Bluff road, on Sunday evening—the evening Black was killed. Mrs. Provine informed me that, on the next day after Black was killed, she saw a man on a sorrel horse in the woods, about three miles east of Paris, which Henry Evans thinks suits the description of Charley Moore and his horse. Harvey Youngblood told me he heard Sam Smith say that Black would never be sheriff of Lamar county."

Continuing on his cross examination, the witness said that

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he did not go with Bill Nelson to Mrs. Provine's house. Mrs. Provine's said house was about three miles east of Paris, and about the same distance west of Reno. Reno was about five miles west from Blossom Prairie. The citizens of Lamar county subscribed a fund to be paid as a reward for the apprehension of the murderer of Black. Detective Jack Duncan was employed to discover the murderer. The next day and night, and for several days and nights, several large parties of citizens scoured the country in search of the assassin. Witness and John Milsap hunted the western part of the county. Intense excitement prevailed throughout the county. On his re-direct examination the witness said that Doctor Rush told him about meeting Charley Moore on the Pine Bluff road on Sunday evening. Investigation showed that Charley Moore spent the fatal night on the Pine Bluff road, four or five miles east of Paris. The said Pine Bluff road was north of the Paris and Blossom Prarie road.

C. H. Schilling testified, for the State, that he was one of the proprietors of Schillings's saloon, in Paris, Texas, in November, 1884, in which concern the defendant was then a silent partner. Witness knew nothing about Captain Parish's gun ever being in that saloon or taken away from there. Newt Harris worked in that saloon as bar tender in July, 1884, but quit just after the primary election, and was about the place but little afterwards. Defendant was often in the saloon when not busy at his office. He was at liberty to go behind the counter, but rarely did so at that time. The witness did not know whether or not defendant and Harris were particular friends, nor did he know whether Harris supported or opposed defendant at the said primary election. Guns were often left and kept in the witness's saloon, but witness could not say that he had ever seen or had not seen Parish's gun in that saloon.

Upon the admission of the defendant's counsel that John Threlkeld lived in the Indian Territory at the time of this trial, and at the time of the examining trial in February, 1885, the State read in evidence the record of his testimony as delivered on the said examining trial. The substance of that testimony was that the witness heard of the killing of Black on the morning after it occurred—being Monday morning. On the preceding Wednesday the defendant came to the witness's gin in Kiomitia county, Choctaw Nation, I. T. He road up to the gin from a northwest direction. Witness shook hands with

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him and asked him what he was doing in that neighborhood. He replied that he had been into Arkansas, but did not say what he had been there for. Witness then told defendant that he understood that John Middleton was at the wagon yard in Paris on the preceding Thursday night. Defendant replied that he did not think that information could be true. Witness replied that it was his understanding that his uncle, Doc Middleton, saw him on that night. Defendant remarked that it was strange he was not captured if in fact he was at the wagon yard, and that if he, defendant, had been in Paris on that Thursday night, and John had gone to the wagon yard, he would have secured him. Witness then told him that it was also reported that John Middleton was at his father's house on Friday. He replied that he doubted the truth of that report, as he had a deputy named Charley Johnson in that neighborhood who most probably would have captured him. Defendant remained at the gin about an hour, either just before or just after noon, and left over the Golden Bluff road towards Paris. He was alone and was traveling on horseback. The witness next saw the defendant and Captain Sam Johnson in a wagon near Golden Bluff. That was on the Friday after the killing of Black, the witness then being on his way to Blossom Prairie to attend the inquest. Defendant was at witness's house on the next day, when the witness delivered to him a bale of cotton in settlement of a debt he owed him. He then left for Paris with the cotton.

Wesley Cooper testified, for the State, that W. H. Roland and Mr. Milsap brought a rusty muzzle-loading shot gun to his, witness's, blacksmith shop, in Paris, some time in 1885. Witness identified it as a gun he had often worked on, and as often borrowed for use from Captain Parish. Parish afterwards claimed it. A gun will look as old and rusty from exposure to the weather for a few days as it will from such exposure for a long time. Witness could not tell how long that gun had been exposed, but it was very rusty.

Sheriff Gunn testified that an old rusty muzzle-loading double-barreled shot gun was brought to his office in 1885 by either Roland, Sisson or Milsap. Witness put that gun in the Farmers' and Merchants' Bank, and afterwards delivered it to Captain Parish, who claimed it.

On cross examination this witness stated that the assassination of Black created profound excitement throughout Lamar

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county, and led to the organization of large bodies of citizens, who scoured the country in search of the assassin. A large sum of money was subscribed and offered as a reward for the apprehension of the guilty party or parties. A detective named Jack Duncan, who lived at Dallas, was employed and put to work on the case. Witness knew nothing about Duncan visiting Blossom Prairie in connection with the murder, but knew that he and others went to the woods to look for a gun after the arrest of defendant and Harris. Duncan also went with the witness to arrest defendant and Harris. On Sunday, February 21, 1885, the witness, at the request of Duncan, sent for Yates to come to the sheriff's office. When Yates got into the office the witness showed him the letter to John Howard, and Yates admitted that he wrote it to John Middleton. He then told witness and Duncan about what he has testified to on this trial. He was then kept about the jail building until the following evening, and in fact pretty much all of the time until the following twenty-sixth day of February, when he testified on the examining trial. The letter to Howard was given to the witness by Duncan. According to the recollection of the witness, Duncan told Yates that he had caught John Middleton and secured his, Yates's, letter. It was agreed that no person would be permitted to talk to Yates until Monday evening. One of the attorneys for the prosecution objected to permission being granted to J. G. Dudley to see Yates. Upon that objection Dudley refused to see Yates.

Re-examined, the witness stated that Yates did not ask to see a lawyer until about the time of the examining trial, when he asked to see J. M. Long, one of the defendant's attorneys. No objection was interposed to Yates seeing an attorney after the examining trial commenced. Duncan started to Kansas on Tuesday after the arrest of defendant and Harris.

J. W. Ownby testified, for the State, that he was county attorney of Lamar county in 1884 and 1885. Some time after the killing of Black the defendant called on the witness to consult him about the sheriff's office. He wanted to know whether, Black never having qualified, his death would necessitate another election for sheriff, or would require him, defendant, as the incumbent, to hold over. The witness could not say that defendant sought his advice with the view of holding on to the office. Witness was interested to the extent that he did not want criminal process returned to his office, worthless because

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served by an illegal sheriff, and consequently, in connection with Captain Hale, investigated the question. As a result, he wrote to the Attorney General, who replied by citing to him certain decisions of the Supreme Court on the question. Defendant, at first, did not want to retain the office of sheriff, but when rumor got to connecting his name with the assassination of Black, he declared that he had no connection with the killing, and that he would hold on to the office if he could legally do so. Defendant's name was, to some extent, coupled with the murder of Black as soon as he got back from Hot Springs, and before his arrest.

Doctor J. F. Hooks testified, for the State, that Charley Moore lived on Emberson Prairie, about nine miles northwest from Paris. He came to witness's office quite early on the morning after the murder of Black, to get witness to dress his sore arm. It was then, the witness thought, much too early for Moore to have ridden from his home to town on that morning. He went from witness's office toward the public square, riding a sorrel horse with a star in the forehead.

R. J. Patton, testified, for the State, that he went into Schilling's saloon in Paris early on the night of February 10, 1885. As he stepped into the front door he heard the name "Middleton" spoken by some person. As he passed into the saloon he saw the defendant and the State's witness Yates behind the counter, talking in a low tone of voice. Yates had a letter and a buff colored envelope in his hand. Witness heard nothing said by either of the parties.

J. A. Booth testified, for the State, that the candidates before the primary election in 1884, for the democratic nomination for sheriff of Lamar county, were the defendant, the deceased, Jack Wooldridge and himself. The only candidates before the people at the general election in November were the defendant and the deceased. Pending the campaign after the primary election the witness heard the defendant say that Black should not talk about either him or his friends, and that Black would never be sheriff of Lamar. By this last remark the witness understood defendant to mean that he would defeat Black at the polls. Black, who, after the election, employed witness to take charge of the jail, came to Paris on the fifteenth day of November, and, together with witness, was shown through the jail by Yates. He left town on that evening and was to return

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and qualify on the following Monday, November 17. Witness did not know where Yates was on the night after Black was killed.

Tom Christopher testified, for the State, that he was arrested in Lamar county, in 1884, on a charge of forgery. He was released on bail, with the deceased as one of the sureties on his bond. Deceased subsequently surrendered the witness on the bond, and witness was again placed in jail at Paris. John Middleton was then in jail under indictment for horse theft. One day the witness got to talking with the defendant about his surrender by Black, and among other things said to him that when he got out he intended to find out from Black why he surrendered him. Defendant said to him: "If a fellow was to set up two or three hundred to you, you would set Black up when you get out, wouldn't you?" Witness laughed a little by way of reply, and John Middleton, who was present, said: "I would." The witness several times after that saw the defendant and John Middleton talking privately, but never heard what passed between them. The witness was acquitted of the charge of forgery, and at the time Black was killed was living on Pine Bluff street in Paris, about half a mile east of the court house. Just after dark on the first or second night after the killing of Black, the witness, then on his way home, met John Middleton on Pine Bluff street. He was going west, toward the court house. He recognized witness and called him to the middle of the road, where he was on his horse, which was either a sorrel or light bay animal. When witness reached him he told witness that he had killed Jim Black, and wanted to know if Newt Harris was at the jail. Witness replied that he did not know. He then asked if witness knew where Bill Nelson was. Witness replied that he did not. He then wanted to know if witness could find Bill Nelson, and said that, having killed Jim Black, if he could get Nelson out and kill him, they could break his d—d neck for all he cared.

Cross examined, the witness stated that he had never testified before in connection with this case. He told Sheriff Gunn, Larkin Hunt and Bill Nelson what he has now testified long before the arrest of the defendant for the murder of Black. At the time of the examining trial of the defendant and Harris, the witness asked Gunn not to place him on the stand, as it would "give him away" to Middleton, who was still at large. The point where the witness met Middleton on the first or second night after the killing of Black, was about five hundred

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yards distant from the public square in Paris. He called witness to the middle of the street, told him that he had killed Black, and asked him if he, witness, could get Nelson out for him. Witness replied that he could and would. As they separated Middleton said to witness: "You will stick to your promise and help me kill Nelson?" Witness replied that he would. Witness then and there agreed with Middleton to help kill Nelson, and renewed the agreement made with him in jail, that they would adhere to each other through life, with the understanding that if either "went back" on the agreement he should be killed by the other. Defendant had no part in nor knowledge of the agreements between witness and Middleton. No agreement was entered into while in jail to kill defendant and Nelson. The witness denied that he ever told Larkin Hunt, W. D. Nelson, D. E. Booker or J. M. Long that Middleton was mad at Nelson for arresting him, and that he, witness, was mad at Black for surrendering him on his bond, and that he and Middleton had agreed in jail that Middleton was to kill Black for him and he was to help Middleton kill Nelson, and that defendant had never talked to him about Black. He did not tell Hunt that he thought a man named Brinley, who was confined in jail for a time, was with Middleton when he killed Black.

Re-examined, the witness stated that, when he entered into the agreement with Middleton to get Nelson out and help kill him, he had no intention of doing it. He agreed because he was afraid of Middleton, and the first time he met Nelson he told him about his meeting and agreement with Middleton. Witness was attached as a witness for the defense on the habeas corpus trial, and again in the trial of Harris. Pending those trials he associated and boarded at the same house with the other defense witnesses. Witness first told what he knew about this case to special Prosecuting Attorney Hodges on the day preceding this trial, which was the first time Hodges ever spoke to him about the case.

George Williams testified, for the State, that pending the election in November, 1884, he heard the defendant say that Black lied on him, and that in the fight which resulted therefrom he knocked Black down. After the killing of Black, and before the arrest of the defendant, the witness and Sheb Williams went into the Chickasaw Nation, and while there heard of the defendant's recent presence in that country. On his return to Paris the witness mentioned to the defendant that he

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heard of him in the Chickasaw country, to which remark the defendant replied that he had been up there in search of the man who killed Black. He added that a white feather should be placed in the cap of the man who should succeed in capturing the murderer of Black. Immediately upon his return from Hot Springs, which was but a day or two after the murder of Black, defendant remarked, in the presence of the witness, that he would catch the murderer of Black if it took him always to do it.

Lewis Holman was the next witness for the State. He testified that he served defendant as deputy sheriff throughout his term of office. In February, 1885, the witness lived at his home on Emberson prairie. Yates came to witness's house one day in February, 1885, and told witness that defendant wanted witness to come to town, prepared for an absence of a week or ten days. Goodjoin came to witness's house later on the same day and delivered to the witness a similar message from the defendant. Witness went to Paris on the next morning and saw and talked to both defendant and Harris. He first met defendant in Schilling's saloon, where he was then tending bar. From that saloon the defendant and witness walked down Lamar Avenue to Britt's wagon yard, and to a point in the wagon yard behind a lumber pile. Defendant said to witness: "Yates has had a letter from that fellow, and we must do something to stop him from writing." He then remarked that he would see Harris and determine what to do, and he and witness separated. On the next morning witness, defendant and Harris met and went to the room of Morgan Crook, which was over the Schilling saloon. No other person was present. Defendant said: "We must do something to stop Middleton from writing, or we will be caught up with." A prolonged conference about the matter resulted in the decision that the witness should go to Wamego, Kansas, see Middleton and prevail on him to leave the country. The witness was selected as the messenger to Middleton upon the supposition that, residing in the country, his absence would not be so likely to arouse suspicion as would that of either the defendant or Harris, who lived in town. Defendant gave witness forty dollars and Harris gave him seventy, the former directing witness, if Middleton would agree to leave the country, to give him all the money except enough to get home on. Harris remarked that if Middleton would not leave the country, and witness would provide

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the opportunity, he would kill Middleton. Defendant said nothing about killing Middleton. The witness left Paris on the twentieth day of February, 1885, and reached Wamego on the second day thereafter. He at once addressed a letter or note to John Howard announcing his arrival and his desire for a meeting, and appointing a place for the meeting. He expected Middleton to get that note. Hearing nothing from him, the witness dropped a second note in the post office a day or two later. Several days after that, hearing nothing from Middleton, he got the second note out of the post office, and decided to go home. He did not know what became of his first note to John Howard. On the evening of the sixth day after his arrival at Wamego, the witness went to the depot and bought a ticket on which to return, and was in the act of boarding the train when he was arrested by Jack Duncan and deputy sheriff Burris, for complicity in the murder of Black. When he got back to Paris the witness entered into an agreement with the county attorney to turn State's evidence, the said agreement being reduced to writing and formulated by Judge R. R. Gaines, who was the witness's counsel. The conditions of that agreement were that the witness was to testify truthfully and fully for the State, and was not to be prosecuted himself.

Witness did not see Middleton in Kansas or elsewhere on his said trip to Kansas. He saw him twice, however, after his escape from jail. The first time was at night, about ten days before the murder of Black. Newt Harris came to witness on the street and told him that Middleton was at the jail, and asked if witness did not want to see him. Witness went to the residence part of the jail, where Harris lived—Harris going with him. They found Middleton and Mrs. Harris in the north room up stairs. Defendant was not about the jail. Old Joe, the negro trusty, was somewhere about the premises, but witness did not know where. If old Joe saw Middleton that night, witness did not know it. After talking for some time, the witness went with Middleton to the southwest corner of the court house, where Middleton's horse was tied. That horse, as well as witness could tell at night, was a bright bay in color. While at the jail that night, the witness remarked to Harris: "I ought to arrest Middleton." Harris replied: "If you try it and Middleton don't kill you, I will." The witness next saw Middleton on the night of the Democratic jollification meeting, which was a very few nights before the murder of Black.

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Statement of the case.

Witness went to the jail that night to lock up old Joe, and found Middleton in the kitchen. He said that he wanted something to eat. As there was nothing in the jail cooked, the witness went to the White Elephant saloon and reported the facts to Harris, who gave him fifty cents with which to buy supper for Middleton. Witness bought some bread, ham and fish, which he took to the kitchen to Middleton. While the latter was eating, witness asked him if he was going to kill Black. He replied he was. Witness asked him why he was going to kill him. He replied: "Harris is a good friend to me, and I will do anything he wants me to do." The witness's question was prompted by a remark previously made by Harris to the effect that if Black fooled with him he would make Middleton kill him. The witness was in the residence part of the jail on the Monday night following the murder of Black, and while there saw Middleton pass through the hall and go up stairs. Some time afterwards Newt Harris came home, and he, Mrs. Harris and witness went into the room where Middleton then was with Yates. The several parties named then had supper. Yates afterwards went off to lock up old Joe, leaving nobody present except witness, Middleton, Harris and Mrs. Harris. Middleton then said that he killed Black, and detailed the circumstances of the killing. He said that he rode up to Black's gate and hallooed, expecting Black to come to the door in which the light was burning, which was the west room; that Black came to the east door and put his head out; that he then asked if that was Mr. Black; that Black replied in the affirmative, and he shot him; that his horse jumped and he dropped the gun, that he got down and recovered the gun and then left, going east, then north and then west, and finally turning into the woods, where he soon got lost; that he then dismounted, hitched his horse to a tree and remained all night, and came to town next morning. He further stated in that conversation that while hiding in the woods that night he saw Bill Nelson and others trailing him, and cocked the gun to kill Nelson, but became afraid that he could not get away; that he afterwards hung the gun in a tree, where he left it.

Continuing, the witness stated that he met the defendant on his return from Hot Springs, a few days after Black was killed, and walked with him from the point where he left the street car to the jail. En route he told defendant that Middleton killed Black, and that he, Middleton, was at the jail on the

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night after the killing. Defendant manifested surprise that witness knew anything about it, and remarked that it would not do be seen talking on the street, as they would attract suspicion. They went on to the residence part of the jail, where they found Harris. Defendant then took some shot and caps from his pocket and put them in a box in a drawer, asking Harris if the shot were like those with which the gun was loaded. Harris replied that he did not know, but that they would do. The shot were placed in the box so that, in case of search, the box would be found to be full. Harris said that he gave Middleton thirty dollars. The defendant, J. C. Hodges, witness, and, the witness thought, Captain Sam Johnson, ate dinner at Harris' house on that day. The witness did not aid in the search for the man who killed Black. He was at Sam Strawther's house when the news of Black's assassination was brought to town. Harris came after him and he went to town. He went to Blossom Prairie on the next night. Some time afterwards defendant went to the house of Buck Harris, Newt Harris' brother, in the Indian Nation, to find Middleton. The witness once asked defendant if any body saw him get the gun out of Schilling's saloon. He replied that he did not know; that he saw two strangers in the saloon at the time, but did not know whether or not they saw him take the gun. Witness did not tell defendant all that Middleton said about the killing of Black; he only told defendant that Middleton killed Black on Sunday night and was at the jail on Monday night.

On his cross examination the witness denied that when, en route to the Nation with Harris, he got to talking about the killing of Black, he told Harris that defendant had nothing to do with it, and had no previous knowledge of a purpose to commit the murder. He did not say that he did not believe defendant had anything to do with it. Witness did not remember telling Argyle Winn, near Brocen's store, that defendant was as innocent of the murder of Black as he was, and knew nothing about it. He remembered that, on the day of defendant's return from Hot Springs, he and defendant met Sterling Price, and that defendant asked him, witness, why he was not out looking for the party who killed Black. To that inquiry witness replied that he went to Blossom Prairie on the fatal night, and was treated like a dog. Defendant replied: "That makes no difference; you must go out and hunt the murderer of Black." Witness never saw defendant and Middleton

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together, never heard them speak to each other, and did not know that defendant ever saw Middleton after his escape from the Paris jail in September, 1884. Witness once remarked to Harris, while Middleton was at large, that it would not do for defendant to know of Middleton's visits to the jail, to which remark Harris made no reply. Witness never heard Middleton say that it would not do for defendant to know of his visits to the jail while he was at large. The witness did not, prior to the killing of Black, tell defendant or any body else that he had seen Middleton in Paris after his escape. On each occasion that he saw Middleton he knew that he was an escaped prisoner, and knew that he had said he was going to kill Black. He did not, of course, know that Middleton would execute that threat, but he knew, as soon as he heard of the killing of Black, that Middleton did it. When, on Monday night, Middleton told about killing Black, he said nothing about any body being with him, but rather left the impression on witness's mind, if he did not actually say so, that he was alone. Witness left the jail that night between ten and eleven o'clock, leaving Harris, Mrs. Harris and Middleton together. He did not know whether Middleton remained there all night or not. The defendant was not in Paris on either of the occasions that Middleton visited the jail after escaping. Defendant, so far as witness was aware, knew nothing about Harris giving witness fifty cents with which to buy food for Middleton. Burris and Duncan, after arresting witness at the depot in Wamego, Kansas, took him to the hotel, where they told him that they had defendant, and Harris, Middleton and Yates, in jail, and that defendant had confessed, implicating witness in the murder of Black; that the defendant wanted to turn State's evidence, but that they were more anxious to secure the conviction of the defendant than that of the witness, and that, if witness would turn witness for the State, they would accept him in preference to defendant. Witness then told them in part what he has related on this stand, and finished the narrative to them en route to Paris. They reached Paris late on Saturday evening, when witness was hastily transferred to jail, where he was kept under guard, and allowed to see no person except the prosecuting lawyers, Jack Duncan, the detective, and Captain J. H. Wright, witness' nephew. Wright went to see Judge Gaines for witness, and the witness then entered into the agreement to turn State's evidence. Just before starting to Kansas wit-

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ness borrowed one hundred dollars from the bank on the endorsement of Henry Miller, but he did not tell Miller he wanted to buy cattle with it for Jack Carter, who would pay the note as soon as he got back. He did not mention Carter's name.

Tom Nichols, recalled by the State, testified that he went into the White Elephant saloon on the night of the Democratic meeting after the November election in 1884, and saw Newt Harris and Sam Smith in there. Harris asked Smith: "Have you seen Jim Black to-day?" Smith replied that he had, and Harris asked: "Did he speak to you?" Smith replied: "No; we were too far apart." Harris then said: "I met him and he did not speak to me. I have got myself into a hell of a fix; Crook and Black are both mad at me." Some other talk was had, and when the said parties separated Harris said: "Never mind; I will have his d—d toes turned up," or perhaps it was: "I will have somebody's toes turned up." The witness did not know whether Harris was speaking of the defendant's or Black's or somebody else's toes, but he had just been talking about defendant and Black. Witness asked defendant, after the death of Black, if he was going to hold the office. He replied: "No; the people of Lamar county have said that they do not want me for sheriff, and I will not have the office."

Harry Miller testified, for the State, that he was in Wamego, Kansas, in February, 1885, and got a drop letter from the post-office addressed to John Howard, which note he sent to Jack Duncan. Witness was then a detective.

After examining two or three other witnesses, and eliciting no new facts, the State rested.

L. B. Hunt was the first witness for the defense. He testified that he lived in Paris, and was city marshal in 1884, and until April, 1885. He was well acquainted with the State's witness Tom Christopher. Prior to the arrest of the defendant upon the charge of killing Black, the said Tom Christopher told the witness that while he was in jail he entered into an agreement with Middleton to kill Bill Nelson and Jim Black, because the former arrested Middleton and the latter surrendered him, Christopher, after signing his bail bond, and that after the death of Black he met Middleton on Pine Bluff street, when Middleton called upon him to carry out his part of the agreement, which he agreed to do. He said that defendant knew nothing whatever about the agreement between him and Middleton.

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Statement of the case.

Cross examined, the witness said that the conversation between himself and Christopher occurred in the Mayor's office. Witness spoke of the matter to his son. He told H. B. Birmingham and Captain Gunn about Christopher's statement before the arrest of the defendant or Harris. Some time after the statement to witness in the Mayor's office, Christopher came to the witness with some letters he had received. He and witness then took the letters to Sheriff Gunn, and Christopher's previous statement was talked over. It was then agreed that the letters should be placed in the bank to be taken out only by either the witness or Gunn. They were placed in the bank on the twentieth day of January, 1885. After the arrest of Crook and Harris, the witness, with Christopher and J. M. Long, one of defendant's attorneys, went to the bank and got the papers. Witness gave them to Long and Long took them to Captain Lightfoot's office. Witness had not seen the said papers since he gave them to Long. A bundle of letters being handed to witness he identified it as the bundle of papers above referred to. The several letters contained in the bundle were brought to witness by Christopher at different times.

W. D. Nelson testified, for the defense, that prior to the arrest of the defendant, Tom Christopher told him that while confined in jail he entered into an agreement with John Middleton to kill the witness and Jim Black; that Middleton wanted to kill witness for arresting him and that he, Christopher, wanted to kill Black for surrendering him on his bond, and that he and Middleton agreed to help each other, and that Crook was no party to and knew nothing of said agreement. Christopher subsequently told witness that after the killing of Black he met Middleton on Pine Bluff street in Paris, when Middleton said to him: "Tom, I have killed Black, and I want you to get Nelson out so that I can kill him;" that he agreed to do so and went up town and pretented to hunt for witness and to be unable to find him; that meanwhile Middleton stood in the east door of the court house watching for witness, and came very near shooting Roland through mistake. Witness arrested Middleton for carrying a pistol, and afterwards caused him to be held for bringing stolen property into the State. Witness went to Blossom Prairie on the night that Black was killed. He found the track of one horse immediately in front of Black's gate, and the track of another horse about fifteen feet distant from the said gate. Leaving that place they went east, then

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north and then west, traveling together, and were lost after entering the woods. As shown by the tracks, one of the horses was much larger than the other. Witness followed those tracks twice—the first time on the fatal night with Ryan, Gose and Booth. It was a dark night, but they had a lantern. Hancock, Gose and Booth were with witness the second time. After the arrest of the defendant, the witness and Duncan, Gose and Tinnin went to the place pointed out by Mrs. Provine (now Mrs. Pickard) as the place where she saw a man and horse on the morning after the murder of Black. They searched that place for a gun, but found none. At the root of the tree where Mrs. Provine said she saw the man stooping they found a small rag which seemed to have fallen from a sore. They did not look for a gun at a point about a half mile north from Reno.

J. M. Long testified, for the defense, that he had known defendant for thirty-five years. The papers now handed to witness were certain letters that were taken from the Paris Exchange Bank by Hunt and Tom Christopher and turned over to witness by Hunt. Witness was of counsel for defendant prior to the change of the venue in this case. Witness was attorney for Christopher on his trial for forgery. One day Christopher, in talking to witness about the murder of Black, told witness that, when in jail, he agreed with John Middleton to kill Nelson and Black; that he wanted to kill Black for surrendering him on his bond, and that Middleton wanted to kill Nelson for arresting him, and that they agreed to help each other. In that same connection he said that the defendant knew nothing whatever about that agreement. He also, at another time, told witness that, after the death of Black, he met Middleton at a bawdy house in Paris, when Middleton told him that he had killed Black.

D. E. Baker testified, for the defense, that pending this trial Tom Christopher told him, in Sherman, that subsequent to the killing of Black he met Middleton on Pine Bluff street in Paris, and that Middleton then told him that he had killed Black, and asked him to decoy Nelson to a place where he could kill him. Witness then asked him if defendant knew anything about his agreement with Middleton to kill Black. He replied that defendant knew nothing about it, so far as he was aware.

O. F. Parish testified, for the defense, that he lived in Paris in November, 1884. He then owned and had owned since 1869

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a certain muzzle loading double barreled shot gun. The last time he saw that shot gun in the year 1884 it was standing behind the counter in Schilling's saloon. That was on the morning of November 14, 1884—the morning after the last jollification of the Democrats that followed the general election. He was drinking on the night of the jubilee and did not know how the gun came to be in the saloon, except by hearsay.

Henry Schilling testified, for the defense, that he knew T. B. Enlow by sight, but did not know him on November 11, 1884. It was not true that Enlow or any body else, on the night of November 11, 1884, or at any other time, called his attention, in his saloon, to a man in the act of removing a shot gun from the said saloon. Cross examined, the witness said that he could not remember that he was in his saloon on the night of November 11, 1884. He did not remember seeing Enlow or Rodgers on that night. He would certainly remember it if his attention had been called to such a thing as the clandestine removal of a shot gun from his saloon. Witness knew that Captain Parish's gun was in his saloon for several days in November, 1884, but he did not know when nor by whom it was removed. No person came into the saloon on the said night and, leaning on the counter, talked to witness.

W. H. Gullick testified for the defense, that "Kicking Jim" gave him a muzzle loading shot gun one night in November, 1884, which he said he took from Captain Parish. Witness put the gun in Schilling's saloon.

Ed Thornton testified, for the defense, that he lived in Bonham, of which town he was city marshal in 1884. On or about September 24, 1884, witness received a telegram from Paris announcing the escape of John Middleton from jail. On the same day he saw the defendant in Bonham on the train bound east towards Paris. He had a prisoner named Chad in custody. Witness told defendant about the escape of Middleton, and that he had noticed a strange man about Bonham. Defendant appeared very angry when told of the escape of Middleton, and on the next day came back to Bonham in search of him. Meantime the strange man mentioned by him had disappeared.

Sterling Price testified, for the defense, that he met the defendant when he got off the train on his return to Paris from Hot Springs, a day or two after the killing of Black. Witness and defendant left the street car together and walked together across the square until they met Lewis Holman. When he

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met Holman, defendant said: "Well, I suppose Black is killed. Do you know who did it?" Holman replied that he did not, and defendant asked him: "Why in the hell are you not out doing something and trying to find the party who did it?" Holman replied: "I went to Blossom Prairie on the night Black was killed, and as they treated me like a d—d dog, I did nothing more." Defendant said: "That makes no difference; you ought to be out hunting the man who killed Black." Witness left about that time, and did not know where defendant and Holman went.

Blake Hooks testified, for the defense, that he lived at Hooks's ferry on Red river, about thirty-five miles northeast of Paris. Early in the fall of 1884 a man suiting the description of John Middleton, accompanied by a negro, crossed into the Nation at witness's ferry. He had a shot gun with him. The negro went back. A few days later defendant came to witness's place looking for John Middleton, for whose arrest he announced a reward of fifty dollars.

Charley Johnson testified, for the defense, that he was a deputy sheriff under the defendant in 1884, and lived on Red river. A few days after the escape of Middleton from jail, the defendant came to the witness's house hunting Middleton. Alex Lowther was with defendant. From witness's house the witness, defendant and Lowther went to the vicinity of the house of Middleton's father, arriving at about eleven o'clock at night. They searched the farms, cotton pens and out houses until nearly day light, when they secreted themselves and watched the house until about sun rise, after which they hunted over adjacent fields and through the brush. The witness did not go into old man Middleton's house, and if either the defendant or Lowther did, the witness did not know it. Defendant offered a reward of fifty dollars for the capture of Middleton

Argyle Winn testified, for the defense, that in a conversation with Lewis Holman in Brocin's shop in Paris, the said Holman told him that defendant was as innocent of complicity in the murder of Black as he, the witness, was. On his cross examination this witness said that, on the occasion referred to, Holman overtook him on his way to Brocin's shop. Witness remarked: "Well, you boys will have to go to work now." Holman replied: "Yes, G—d d—n them, they have turned us out, but they know no more about how Black was killed than you do. Mack Crook is as innocent as you are." This last state-

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ment was in reply to the witness's question whether defendant had anything to do with the killing of Black.

J. M. C. Yates testified, for the defense, that he lived in Lamar county, Texas, seven miles north east from Paris. On Sunday—the day of the killing at night—two men passed the witness's house, traveling from towards Paris. One of them asked for directions to Blossom Prairie, remarking that they were somewhat lost. They were then between three and four miles from the Blossom Prairie depot, and the time was an hour or two before sunset. The men were riding light bay or sorrel horses, one being considerably larger than the other. One of the men had a double barreled shot gun. The witness had no distinct recollection as to whether either man wore a beard, but thinks that one had a light mustache. That man was thirty or thirty-five years old. The other was probably somewhat older.

Isaac Nowlin testified, for the defense, that he lived seven miles northeast of Paris. On his way home from church, between two and three o'clock on the evening of the fatal Sunday, the witness met two horsemen who inquired the way to Blossom Prairie. He met them at Sugar Hill, about two miles from the place where the witness Yates stated that he saw two men. One of the said men was riding a fair sized light bay or sorrel horse, and had a double barreled shot gun. The other was riding a darker bay or light brown horse that was smaller than the other horse. The man on the small horse had a dark complexion, and a small dark mustache. He wore a dark colored suit of clothes and a dark colored slouch hat, and was between thirty and thirty-five years old. The other man had a light complexion and a heavy sandy mustache. He wore brown clothes and a light colored hat, and carried a double barreled shot gun.

H. B. Smith, for the defense, giving substantially the same description of the two men as that given by the witness Nowlin, said that he saw the said men at an old tie mill about a mile and a half from Blossom Prairie, at about half an hour before sun set, on the evening of the fatal Sunday. They asked him if they were on the right road to go to Blossom Prairie. The said men were strangers to the witness.

Alex Lowther testified, for the defense, that he lived in Paris in November, 1884. He spent the night of November 11, 1884, at defendant's house. Defendant returned from a trip on the

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evening of that day, and was to, and did, start to Hot Springs on the next morning. He asked witness to go home with him that night, and to stay at his house with his children while he was gone. They went to the house before dark. Defendant went to bed about eight o'clock, and witness retired about nine o'clock, sleeping in the same bed. Witness knew that defendant did not leave his house on that night after dark. The object of this testimony was to contradict the testimony of Enlow, to the effect that defendant was the man who removed the gun from Schilling's saloon, between ten and eleven o'clock that night. The witness located the date—November 11—particularly, because, on the night that Black was killed, he counted back, and found it to be on the twelfth day of November that defendant left for Hot Springs—and it was the previous night that he slept with defendant at his house.

On cross examination, this witness was asked if he did not, on the habeas corpus trial, testify that his attention to the date on which he spent the night at Crook's house was first attracted by the testimony of Easton (Enlow?). Confronted with his written testimony to that effect, he admitted that he so testified, but declared that he then failed to remember the first time his attention was directed to the said date. The witness told Mr. Dudley, defendant's counsel, before the habeas corpus trial, that he spent the night of November 11, 1884, with defendant at his, defendant's, house. The witness did not then know Enlow. He was attached as a witness by the defense, but did not know what was expected to be proved by him until Enlow testified. The witness was upstairs over Schilling's saloon when he heard of the killing of Black. He did not know of any search for the murderer of Black being made by defendant or any of his deputies. He knew that defendant, during the inquest on the body of Black, went in a wagon with Captain Sam Johnson to the house of Threlkeld, in the Nation, to get a bale of cotton.

Mrs. Mack Crook, the wife of the defendant, testified that she went to Hot Springs, Arkansas, some time before the killing of Black, and being sick, wrote to the defendant to come and see her. He arrived at Hot Springs on November 13, 1884. On November 17, he received a telegram from his brother Lewis, informing him of the killing of Black, and he left Hot Springs by the next train to return to Paris.

Andy Gray testified, for the defense, that he was one of the

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parties who went to Sherman in 1886 to attend the trial of this case, and was among the witnesses congregated at the depot in Paris waiting for the train. Several of the parties, including witness, defendant, Belcher, Sam Smith and Enlow, stepped out of the depot building to take a drink from a bottle of whisky that Smith had. While outside the depot Enlow, in the presence and hearing of witness, told defendant that on a previous hearing of this case he testified that he, defendant, was the man he saw get the gun out of the Schilling saloon, but that in so testifying he was mistaken, that he, defendant, was not the man he, Enlow, saw take the gun. Witness thought that Enlow was then pretty full of whisky, but not so drunk as not to know what he was talking about.

Dick Owen, conductor on the Texas & Pacific railway, testified, for the defense, that a day or two after the murder of Black, the defendant got off the Iron Mountain railway at Texarkana, and boarded his, witness's, train and traveled with him as far as Paris, Texas. Hot Springs, Arkansas, was about three hundred miles distant from Paris, Texas. The only direct route from Hot Springs to Paris was by the Texas & Pacific railway via Texarkana.

Richard Moore testified, for the defense, that Newt Harris was a bar tender in the White Elephant saloon in Paris, in November, 1884, and was on watch from and after six o'clock in the evening on the seventeenth day of that month. On his cross examination the witness said that he could not state positively who was on watch at the White Elephant saloon on the night of November 17, 1884. It was a custom for the man on watch, if he wanted to leave the saloon temporarily, to get some person to take his place on watch. It was the business of the bar tender to stay at his post during the period of his watch.

D. E. Booker testified, for the defense, that at no time on the night after Black's death did he relieve Harris on watch at the White Elephant saloon. Witness did not visit that saloon that night.

Harvey Boyd testified, for the defense, that he lived in Paris and was nineteen years old. He knew Tom Nichols, and was with him on Main street near Lynch's stable on the night of the last Democratic celebration after the election in 1884. Tom Nichols said nothing to witness about a jail bird on that night. Witness had seen John Middleton in jail and knew that Nichols did not meet Middleton on that night while he, witness, was

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with him, Nichols. On his cross examination the witness said that he and Nichols, on the night in question, talked about two negroes who had recently escaped from jail. He and Nichols may have passed some body on the street near the stable on that night, but witness had no recollection of hearing Nichols say: "There goes a jail bird." He had no recollection of ever telling Birmingham that he was with Nichols when they met Middleton on that night.

John A. Gose testified, for the defense, that he went with Duncan and Nelson to Mrs. Provine's house, after the arrest of defendant, and from there, under the escort of Mrs. Provine, to the place in the woods where she claimed to have seen the man in the woods on the morning after the killing. They searched the neighborhood for a gun, but found none. Duncan found a piece of cloth which looked as if it had fallen or been removed from a sore. The place where Mrs. Provine said she saw the man was about three miles distant from Reno. The gun was not hunted for at a place a half or three-quarters of a mile above Reno.

Mr. Pope testified, for the defense, that he lived in Blossom Prairie and was at home when Black was killed. He heard the fatal shot fired, and shortly afterwards went to Black's house. He at once searched for tracks, and found the track of a horse in front of Black's gate. He trailed that track east and north and then west to a point in the woods where it appeared to stop. It appeared that the rider dismounted at that point. At a point beyond the point in the woods last mentioned, the track trailed by witness and the track of another horse came together, whence the two horses traveled in company. From that point the witness and others trailed the tracks of the said two horses to Slate shoals on Red river, sixteen miles distant from Blossom Prairie. One of the tracks thus trailed by witness was the same track found at Black's gate. There was another horse track near Black's house, but it was not a fresh track.

Mr. Martin testified, for the defense, that he lived within three-quarters of a mile of Blossom Prairie depot, and was at home on the fatal night and heard the fatal shot. Soon thereafter, three horsemen, one riding a gray horse, passed the witness's house, riding in a lope. One of the Dudley boys owned a gray horse, and witness afterwards learned that it was the Dudley boys who passed his house on that night.

Henry Miller testified, for the defense, that a short time be-

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fore the arrest of defendant, he saw Lewis Holman in Paris, and at his request endorsed a note to the Paris Exchange bank for one hundred and eight dollars. Holman told witness that he was buying cattle for Jack Carter, and had found some exceedingly cheap cattle which he wanted to buy for Carter; that Carter was temporarily absent, but would soon be back, when he would take up the note. Witness afterwards paid that note, and had not as yet been reimbursed.

Lem Oakes testified, for the defense, that he lived in the Choctaw Nation, Indian Territory, about twenty-six miles from Paris. He represented his county in the Senate of the Choctaw Nation. A sallow faced young man came to the witness's house in the Choctaw Nation on the morning of November 17, 1884, and got his breakfast. He came on foot and had a slicker in his hands in which something, which the witness took to be a gun, was wrapped. He was a slender man and would weigh perhaps one hundred and sixty pounds. His eyes were dark gray or blue in color. His mustache, which was rather thin, was of a light brown color. He wore dark clothing and a slouch hat. His hair was light brown in color, and he would measure about five feet nine inches in height. Witness did not know him. On the evening of the same day the witness heard of the killing of Black on the night before.

James Spring testified, for the defense, that he lived in the Choctaw Nation and was the sheriff of his county. He heard of the killing of Black on the seventeenth day of November, 1884. On the morning of the said day, November 17, the witness saw a man on a sorrel horse near the house of Senator Lem Oakes. That man approached the witness from the direction of a piece of timber to the right of Oakes's house. He asked if witness could tell him where Doc Middleton and his hunting party were camped. Witness directed him to the said camp, which was near the Spence crossing of the Kiomitia river, about twelve miles distant. That man, whom the witness described substantially as Oakes described the man who took breakfast at his house, had a slicker with him, and a gun in a scabbard attached to the saddle, which the witness supposed was a Winchester rifle.

Daniel Miller testified, for the defense, that he lived in Kiomitia county, Choctaw Nation, and was a local preacher. About dark on the night of November 16, 1884—the night of the assassination of Black—a man came to the witness's house in the

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Choctaw Nation, and asked to stay all night. He got his supper and had his horse fed, and then decided to leave, which he did after asking witness if a party of hunters were camped anywhere on Salt creek. That man was riding either a light bay or a sorrel horse. He had a slicker tied behind his saddle, and a Winchester in a scabbard attached to the side of his saddle. He was twenty-eight or thirty years old, and would weigh between one hundred and fifty and one hundred and sixty pounds. He was rather heavy of build, had dark hair and brown mustache, and wore dark clothing and a black slouch hat. Witness did not know him. The witness's said house was about thirty-five miles distant from Paris, and about as far from Blossom Prairie in Lamar county. The witness was positive about the date of that man's visit because Dick Lock spent the very next night at his house, and brought the news of the assassination of Black on the night before.

Dick Lock testified, for the defense, that he was in Paris on the sixteenth day of November, 1884. He started to his home in the Choctaw Nation on the next day, and spent that night at Daniel Miller's house. He told Miller that night of the murder of Black on the night before.

Lem Oakes, recalled by the defense, testified that Doc Middleton and a party of hunters, including John Threlkeld and Armstrong, were camped on Long creek, two miles beyond Salt creek, until the Thursday or Friday preceding the Monday morning on which the man described by witness when first on the stand came to witness's house. Doc Middleton was an uncle of John Middleton, and was the same Doc Middleton who, in 1884, lived on Tinnin's farm on Red river. He now lives in the Choctaw Nation.

Henry Campbell testified, for the defense, that he lived in the Choctaw Nation, and in 1884 was a United States deputy marshal. He knew where Doc Middleton and his party of hunters were camped on the Kiomitia river in the said Nation in 1884. He heard of the killing of Black on the Tuesday after the fatal Sunday night. He saw Doc Middleton's party in camp on Monday and Wednesday following the assassination. He crossed the Kiomitia river at the Spence crossing on the morning of the said Monday, and about noon was overtaken by John Middleton, who rode with him as far as a mile. John Middleton asked for and witness gave him directions to Doc Middleton's camp. He was riding a light bay or a sorrel horse,

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had a Winchester in a scabbard attached to his saddle, and a slicker tied behind his saddle. Witness had then known John Middleton two or three years. The Spence crossing of the Kiomitia river was forty or fifty miles distant from Paris, Texas. This witness was severely cross examined, but adhered to his statement that he saw John Middleton at the Spence crossing of the Kiomitia river, in the Choctaw Nation, about noon on November 17, 1884, the day after the night of the assassination of Black. He had never known but the one John Middleton he then met, but did not know that he was the same John Middleton who escaped from the Paris jail in September, 1884. The general description of John Middleton, as given by this witness (and by the succeeding witness Kelly) corresponded with the description given by Oakes, Spring and Miller of the man they saw at the times mentioned in their testimony.

Dick Kelly testified, for the defense, that he lived in Wheelock, in the Choctaw Nation. Witness knew John Middleton, and last saw him on the night of Monday, November 17, 1884, at the house of Stephen Frazier, in the Choctaw Nation, where Middleton got supper and had his horse fed. On the following Wednesday the witness heard of the killing of Black on the preceding Sunday night. Frazier's house was about fifteen miles distant from Daniel Miller's house, and about twenty-five miles distant from Senator Oakes's house.

Four witnesses for the defense testified that they were acquainted with the State's witness Christopher, and knew his reputation for truth and veracity. It was bad, and such as not to entitle him to credit on oath.

The defense closed.

The State, in rebuttal, read in evidence the testimony of Doc Middleton as delivered on the examining trial in February, 1885. It is as follows: "I resided during last September on the river, about a mile, I think, below Tinnin's, and about twenty miles from Paris. I saw John Middleton at night, about two or three days after he got out of jail. I saw him between my place and his father's. I do not know of my own knowledge where he had been that day. Some time during that day he came to my house and got a gun. He took it without my permission, and I don't suppose he stayed there long after that. That was the last time I ever saw him. His parents then lived about

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three hundred yards from me. They moved away after the killing of Black."

Two witnesses testified for the State, in rebuttal, that they had known Harvey Boyd all his life, and that his reputation for truth and veracity was bad. One of the said witnesses did not consider him entitled to credit on oath, while the other was unwilling to impugn his reputation to that extent. A third witness testified that Harvey's reputation for truth and veracity as a boy was bad, but he had not heard it discussed in later years.

R. F. Scott and T. W. Carlock testified, for the State, that they saw Newt Harris in Paris on the day of the general election, electioneering for the defendant, who was a candidate for sheriff.

R. R. Hazlewood testified, for the State, in rebuttal, that he lived in Delta county ten or twelve years, and had been acquainted with L. B. Enlow about fourteen years. Enlow's reputation for truth and veracity had always been good in Delta county.

The defense witnesses Campbell and Kelly, having testified that the John Middleton they knew had no remarkable peculiarity of form or feature, was not stoop shouldered nor in the habit of looking down or away from a person with whom he conversed, and that his cheek bones were not materially high, nor his face particularly full or long, the State introduced Messrs. Hugh Tinnin and Henry Warren as rebutting witnesses. They testified that the John Middleton who escaped from the Paris jail in September, 1884, and who was charged with the murder of Black, was a young man about twenty-eight or thirty years old. He was about five feet and ten inches in height; had dark hair and a thin mustache somewhat lighter in color than his hair; a full face, high, sloping and broad forehead, particularly high cheek bones, short chin and blue eyes. He had a peculiar expression of the eyes, and seemed to be unable to look a person in the face while talking to him. His shoulders were wide—much wider than he was across the hips, and were somewhat stooped. His neck appeared to start out of his shoulders too low down on his breast.

J. G. Dudley, Maxey, Lightfoot & Denton, H. D. McDonald, W. B. Wright, and *Silas Hare,* filed able and exhaustive briefs and arguments for the appellant.

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Opinion of the court.

W. L. Davidson, Assistant Attorney General, and *J. C. Hodges*, for the State.

WILLSON, JUDGE. Eliminating surplusage from that portion of the indictment which charges the defendant and Newt Harris with being accomplices to the murder of James H. Black, it reads as follows: "That about November 12, 1884, in said county and State, one Mack Crook and one Newt Harris did unlawfully, and with their express malice aforethought, advise and encourage the said John Middleton to commit said offense of murder before the said John Middleton did kill and murder the said James H. Black, and did prepare and furnish said John Middleton with a gun for the purpose of aiding and assisting the said John Middleton in killing and murdering the said James H. Black as aforesaid; and the said Mack Crook and the said Newt Harris was not present when the said John Middleton killed and murdered the said James H. Black as aforesaid." We regard the above as a single count, and while it is not framed in strict accordance with precedent, and is not critically correct, it is, in our opinion, substantially sufficient, and the trial court did not err in overruling the defendant's exceptions to it.

In a prosecution against a defendant charged as an accomplice, it is essential for the State to establish the guilt of the principal of the crime charged to have been committed by him. In this case it was essential for the State to establish the guilt of John Middleton, the alleged principal of the murder of James H. Black. Without proof of Middleton's guilt as principal, the defendant could not be convicted as an accomplice. In establishing the guilt of Middleton any evidence which would have been competent, had he been on trial, was competent on the trial of the defendant as an accomplice, not for the purpose of proving that defendant was an accomplice, but for the purpose solely of proving that Middleton committed the murder, and the degree of the murder. (Penal Code, art. 89; Arnold v. The State, 9 Texas Ct. App., 435; Poston v. The State, 12 Texas Ct. App., 408; Whart. Cr. Ev., sec. 602.)

If Middleton had been on trial his detailed confession made to Holman would have been admissible in evidence against him, and was therefore admissible evidence in this case to prove his guilt as principal in the murder of Black, but not to prove that the defendant was an accomplice in that murder, or

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had any guilty connection with it. It was not error, we think, to admit the testimony of the witness Holman, detailing the confession of Middleton. In the charge to the jury, the purpose for which this testimony was admitted was clearly explained to the jury, accompanied by the emphatic instruction that it could not be considered against the defendant for any purpose, but could only be considered for the purpose of showing that Middleton may have killed Black. These remarks are applicable also to the testimony of the witness Christopher, detailing Middleton's confession made to him of the murder of Black. (Simms v. The State, 10 Texas Ct. App., 131.)

It is claimed by defendant as error that the acts, declarations and statements of Newt Harris, and the conversation between Holman, Harris and Middleton, as detailed by the witness Holman, were admitted in evidence against him, he not having been present at the time of the transpiring of said acts, declarations, statements and conversation, and it not being shown that a conspiracy existed between him and Harris, Holman and Middleton to murder Black. This testimony was clearly hearsay, and was inadmissible except upon the predicate of the existence of such a conspiracy. It was the province of the trial judge primarily to determine whether the predicate which would render the testimony admissible had been established by the evidence. He concluded that the predicate of conspiracy had been laid, and admitted said testimony. We shall not determine whether or not this conclusion of the trial judge is sustained by the evidence. It is only necessary to say that the sufficiency of the predicate laid for the admission of said testimony was a question in the case and a vital one, and that question should have been submitted to the jury with instructions to disregard said testimony in case they were not satisfied from other evidence in the case, that the conspiracy upon which the admissibility of said testimony depended had been proved. (Loggins v. The State, 8 Texas Ct. App., 434.)

The jury should, in this connection, have been further instructed that such conspiracy could not be established by the acts or declarations of a co-conspirator made after the consummation of the offense and in the absence of the defendant. (Cohea v. The State, 17 Texas Ct. App., 153; Menges v. The State, 25 Texas Ct. App., 710.) With respect to said testimony the charge of the court is materially defective in the particulars above mentioned. Special charge fourteen, requested by the

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defendant, reads as follows: "No acts or declarations of John Middleton or Newt Harris or Lewis Holman, made after the killing of Black, can be considered by you in determining whether the defendant furnished or assisted in furnishing the gun to John Middleton for the purpose of killing Black, and unless you find from the evidence some testimony outside of such declarations tending to connect Mack Crook with the offense, you will find him not guilty." This charge should, we think, have been given. It was abstractly correct, and was called for by the evidence in the case.

Defendant's bill of exceptions number thirty-four, relating to the remarks of the trial judge, made to counsel in presence and hearing of the jury, upon the admissibility of certain evidence offered by the State, is well taken. The remarks were in violation of article 729 of the Code of Criminal Procedure, and might have prejudiced the rights of the defendant. Pending the discussion and decision of the admissibility of said testimony, the jury should have been retired from the court room. (Moncallo v. The State, 12 Texas Ct. App., 171; Wilson v. The State, 17 Texas Ct. App., 525; Rodrigues v. The State, 23 Texas Ct. App., 503.)

It was not error to permit the State to prove that the general reputation of the witness Enlow for truth and veracity was good. Said witness was a stranger in the county of the trial, and his credibility had been attacked by the defendant by showing, or attempting to show that he had made statements contradictory to his testimony on the trial. (Coombs v. The State, 17 Texas Ct. App., 258; Phillips v. The State, 19 Texas Ct. App., 158; Williams v. The State, 24 Texas Ct. App., 637.)

It was not error to admit in evidence the testimony of the witness Threlkeld, taken before the examining court. A proper predicate was laid for the admission of said testimony. It was shown that said witness resided beyond the limits of this State. The fact that he was a non-resident of this State at the time said testimony was taken does not render it inadmissible. (Code Crim. Proc. arts., 772, 773, 774; Willson's Crim. Stats., sec. 2535.)

It was not error to refuse to permit the defendant to prove the declarations of Jack Duncan in regard to the gun. This was hearsay testimony. Defendant should have called Jack Duncan to testify about the gun.

There are some other exceptions reserved by the defendant

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to the rulings of the court admitting testimony offered by the State, but they are either embraced in the exceptions already discussed, or are immaterial, and hence we will not specifically notice them. We have discussed and determined such of the exceptions as in our opinion are of any importance.

Numerous objections are made by counsel for the defendant to the charge of the court. We shall notice such only as appear to us to be maintainable. It was unnecessary and improper to define in the charge an assault, and a battery, though this was an immaterial errror; but it was excepted to by the defendant at the trial, and thereby became reversible error. An assault and battery was necessarily included in the act of killing, and in defining murder a sufficient definition of assault and battery was embraced for the purposes of this case, and a further and specific definition of the offense of assault and battery could only tend to encumber the charge, and confuse the minds of the jury with matter not pertinent to the issue being tried by them.

In all trials for murder it is the imperative duty of the court to instruct the jury as to the meaning of "malice," or "malice aforethought." It is fundamental error to omit such instruction, and a definition of "express malice" will not cure the omission. (Willson's Crim. Stat., sec. 1061.) In this case the charge fails to explain the legal meaning of "malice aforethought."

In the charge "express malice" is defined to be "where one with a calm, sedate and deliberate mind and formed design kills another." This definition is incomplete and incorrect. Justifiable or excusable homicide may be committed with a calm, sedate and deliberate mind, and a formed design to kill another. The definition should have been "where one with a calm, sedate and deliberate mind and a formed design *unlawfully* kills another," etc. (Pickens v. The State, 13 Texas Ct. App., 351.)

Upon the issue of *alibi* as to the principal, Middleton, the charge is defective. It requires the jury to believe from the evidence that Middleton was not present at the time and place that Black was killed, when the correct rule is that if the evidence raised in the minds of the jury a reasonable doubt as to his presence at said time and place, he should be found not guilty. This imperfect charge was excepted to by the defend-

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ant, and is therefore reversible error. (Wilson's Cr. Statutes, sec. 2343.)

In other respects than those we have specified, we think the charge of the court is full, fair, correct, and remarkably pertinent to the facts, and plain to the common understanding. It explains very fully and clearly the rules relating to accomplice testimony, defining who are accomplices within the meaning of Article 741, Code Crim. Proc., and it applies those rules not only to the defendant's connection with the offense, but to the connection therewith of the alleged principal, Middleton.

It was not essential, though proper, that the charge of the court should instruct the jury in the forms of verdicts which they might render in the case. (Williams v. The State, 24 Texas Ct. App., 637.) The form of a verdict of guilty, as prescribed in this case in the charge of the court, is, we think, unobjectionable, and the verdict is in accordance therewith. The indictment did not charge the defendant with the murder of Black, but with being an accomplice to said murder. Being an accomplice to a crime is a distinct offense, specifically defined in our code. (Penal Code, Art. 79.) The accomplice is punishable in the same manner as the principal offender. (Ibid, Art. 80.) The jury could not legally have found the defendant guilty of any offense but that charged against him in the indictment, which was the offense of being an accomplice to murder in the first degree. We are unable to perceive the force of the objections made to the verdict.

As to the sufficiency of the evidence to support the conviction, it being unnecessary to a disposition of this appeal that we should pass upon that question, we shall refrain from doing so, as on another trial of the case the evidence may be essentially different from that now before us.

Because of the several errors in the rulings and charge of the trial court, which we have specified, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered February 9, 1889.

Judge Hurt is of the opinion, that being an accomplice to a crime is not a specific offense; that the accomplice is guilty of the offense committed by the principal.

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No. 2595

MACK GREEN *v.* THE STATE.

1. MURDER—INDICTMENT.—The indictment charged that "Mack Green, on or about the first day of May, 1888, in the county and State aforesaid, did, with malice aforethought, kill Sam Smith by shooting him with a gun; contrary," etc. On motion in arrest of judgment, the indictment is *held* a good indictment for murder, and sufficient to sustain a conviction in the first degree.
2. CHARGE OF THE COURT—MURDER OF THE SECOND DEGREE—MANSLAUGHTER.—In a trial for murder the inculpatory evidence tended to prove that the defendant and his brother waylaid the deceased, and that he was fired upon and killed by one or both of them—both being present and acting together in perpetrating the homicide. According to the defense, the meeting of the deceased with the defendant and his brother was accidental, and the first shot was fired by the deceased at the defendant's brother, who, in self defense, and with no co-operation of defendant, fired upon and killed the deceased. The trial court gave in charge to the jury the law of murder of the first degree, and of justifiable homicide in self defense, but refused to give in charge the law of murder of the second degree and of manslaughter. *Held*, that the charge covered the only issues in the case, and properly omitted the law of murder of the second degree and of manslaughter.

APPEAL from the District Court of Comanche. Tried below before the Hon. T. H. Conner.

At the August term, 1888, of the district court of Comanche county Mack Green, the appellant, was indicted for the murder of Sam Smith by shooting him with a gun on May 1, 1888. A trial was had at the same term, and appellant was found guilty of murder in the first degree, with a life term in the penitentiary assessed as his punishment. His motion for a new trial being overruled he appealed to this court and assigns many errors. The brief and argument of his counsel discloses the fact that his brother Tom was separately indicted for the same offense.

About seventy witnesses were examined in the case, and the record contains a hundred and fifty pages of statement of facts and bills of exceptions. The testimony consists largely of local description and circumstantial details elicited for the purpose

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of establishing the presence and participation of appellant in the perpetration of the homicide. Instead of setting out the evidence of the numerous witnesses it is deemed sufficient to select the most important portions, and to give a condensed statement of such material facts as were not contested at the trial below.

Late in the afternoon of May 1, 1888, the dead body of Sam Smith was found in the woods about half a mile from his house which was situate about six miles west from DeLeon, a village in Comanche county. Many gunshot wounds were found on the corpse. John Lewis, a State's witness, testified that he assisted in removing the clothing from the body, and found and examined the wounds. "There were bullet holes above and below one nipple; in the front part of his legs, and two in the back; one on each side of the back bone. There was one shot in his arm. There was a large wound where several shot had entered his head above and back of the ear, and a shot had cut the under part of the ear. All shot were rather large—some buck shot. Shot in the back seemed to have gone in straight."

Describing the indications at and near the body, George M. Phillips, who was one of the first persons who saw it, stated that close to and on both sides of the body he saw the tracks of a small boot or shoe, number five or six in size, with high heels, one of them slightly run down. This track was traced a distance of eighty or ninety yards through some bushes to a point where two horses had stood. Coming from that point toward the body, the track indicated that the person who made it moved in a walk, but that, when he returned to the horses, he moved in a run, and the horses went in a run from that point in a course which would take them a little south of the house of old man Green, the father of the appellant. The witness Phillips saw no other tracks at the body except that of the deceased, which he identified by its size and by the fact that it proceeded no further than to the point at which the body lay. This track indicated that the deceased was proceeding in a direct, straight forward walk until within about three feet of where he fell, where it indicated that the deceased careened or staggered in his walk. That same night the witness saw the appellant and examined his boots for the purpose of comparing them with the tracks seen at the body, and the witness concluded that the small tracks at the body were made by the appellant's boots. The point at which the two horses had stood

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was a little west of north from the body. A man on a horse at that point could have been seen from the body. This witness thought that the distance from the body to old man Green's house was about three-quarters of a mile, and about a mile from said house to the deceased's. In the direction of where the horses had stood, and twenty or thirty steps from the body, the witness found a piece of gun wadding, and about two or three feet north of the body he found a Winchester gun, but did not examine it.

John Johnson, testifying for the State, said that he was at his home in the afternoon of May 1, 1888, when a small boy came from old man Green's and told him that Sam Smith had been killed. He at once went to Green's, and there found old man and Mrs. Green, W. C. Burrow and J. W. Martin. Old man Green told where Smith's body could be found, and witness, accompanied by Burrow and Martin, started off to find it. They first went in a northwest direction, but, not finding it after searching an hour or so, the witness and Martin returned to Green's, and from there they took and followed the back tracks of some horses to where the body was. They saw where those horses had stopped. Bellew (usually called Belyeu in the record) had already found the body, and was the only person then at it. He hailed the witness and Martin when they got within a hundred yards or so, and told them he had found the body. This witness observed the tracks of two persons who had approached the body from the point where the two horses had stood, but the larger tracks stopped some forty yards from the body. By the testimony of this and several other witnesses it was proved that a number of trees and bushes which intervened between the point at which the horses had stood and that at which the deceased lay bore the marks of bullets or shot. Also by this witness and several others the State made proof that on a hill overlooking the deceased's house, and about three hundred and fifty or four hundred yards from it were found the tracks of two horses and the tracks of two men. The horses had apparently been stopped and hitched a short distance from a rocky point from which the deceased's house and premises could be partially seen, and from where the horses had been hitched the tracks of their riders proceeded to the said rocky point. One of those tracks was that of a boot or shoe about a number five or six in size, with high heels, and the tracks showed that the heel of one of the boots or shoes

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was run down. The other track looked like that of a number seven or eight shoe with broad soles and heels. Indications on the ground and bushes where the horses had stood showed that they had been hitched there some time, and that one was a large and the other a small horse. A peculiarity about one of these horse tracks showed that in the hoof which made it there was a gap or broken place which made no impression on the ground. Some of the witnesses testified that a very similar peculiarity was apparent in one of the horse tracks found near the body of the deceased. Several members of the Green family, however, testifying for the defense, denied that there was any such a peculiarity in the hoofs of either of the horses ridden on the fatal afternoon by the appellant and his brother Tom. The trail of the horses was followed by several of the State's witnesses from the rocky hill which overlooked the deceased's house. With the usual amount of discrepancy in such testimony, these witnesses described the course of the trail until it led them to the spot at which two horses had stood near the body of the deceased.

Mrs. M. Smith, the widow of the deceased, testified for the State, that she first heard of her husband's death about half an hour before sunset in the afternoon of May 1, 1888. About the middle of that afternoon he started from his home in a southwest direction, for the purpose, as he said, of looking for his goats, as he was in the habit of doing when they failed to come up in the afternoon. He took with him, as was also his habit, his Winchester gun. Within an hour after his departure from the house, the witness heard the reports of some twelve or fifteen shots, fired in a southerly direction from the house. Deceased and Belyeu had been working on a fence, and deceased, when he left to look for his goats, left Belyeu at the fence.

John Rhoads, for the State, testified that he was the jailer of Comanche county. When the appellant and his brother Tom were brought to the jail from De Leon, the appellant was wearing a pair of small boots, about number five or six, narrow soled, and with high heels, one or both of which were run down. Tom Green was wearing a pair of shoes about number eight in size, with broad soles and flat heels.

E. N. Waldrop, for the State, testified that he saw the appellant and Tom Green at De Leon about sunset of the fatal day.

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Tom Green was riding a mare pony. Appellant was riding a horse larger than Tom's pony, and with larger feet.

J. R. Belyeu, testifying for the State, said that when he learned that Sam Smith had been killed he called a man named Taylor and they went to look for Smith. Not finding him soon, witness went back to Smith's house, and from there trailed him by his tracks. The witness described the course of the trail for some seven hundred yards to the spot at which he found Smith's body, and near which he observed the tracks of goats. Some time after Smith left the house to search for his goats, the witness heard twelve or fifteen shots fired in the direction of the place where he found Smith's body. This witness was living with the deceased at the time of the homicide, and they went to De Leon together in a wagon the day before that event. At De Leon the witness met the appellant, who cursed and abused the witness and the deceased, calling them d—d rascals, d—d fools, etc., because they had caused him to be arrested. Part of the time the deceased was near by and heard some of the appellant's talk. Appellant said he would kill the deceased and witness, if he had to take the brush for it. He came up to witness and said: "What in the hell and damnation did you swear out that writ for?" And then followed his abuse already stated. The witness admitted that he had not testified at the examining trial about this abuse, inasmuch as he was not questioned about it. He never heard the deceased say anything about the appellant's abusive language on that occasion, and he denied that he and the deceased, just before they started home, had a conversation in the presence of appellant's brother Frank, in which the deceased said to witness: "Hurry and load the wagon and let's start home, and I will kill the son of a bitch as they go home."

Dr. S. W. Walker, for the State, testified that the day before the homicide he saw the appellant and Tom Green talking to Belyeu in De Leon. Appellant was proposing to whip Belyeu or any friend of his. Deceased, who was standing near by at the time, afterwards got witness to go to the Greens and try to pacify them. Witness told them that the deceased sent them word that he was sick and unable to fight them, and did not want to fight them. Finally the Greens said they would not fight the deceased that day. Witness did not hear the deceased use any bad language about the Greens on that day.

Mrs. Tims, a sister of Belyeu, testified that, the Sunday night

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week before the homicide, she attended prayer meeting at the school house and was seated close to the door. Just outside of the door the appellant was talking to some one, and she heard him say that if Smith and Belyeu caused him to pay a fine he would kill them both.

W. M. Littlefield, for the State, testified that Henry Bennett and he were plowing in his field on the day Smith was killed. About the middle of that afternoon they heard the reports of fire arms in the direction of the spot where Smith's body was found. The first and second shots were so nearly simultaneous that he could barely distinguish them apart. Then while it would take a man to walk say twenty or thirty steps, twelve more shots were fired as fast as they could be counted, and then there was a pause and a single shot followed. This single shot was keener and sharper than the previous ones, and seemed to be the report of a rifle. The previous reports sounded like those of shot guns. Witness heard some one in the same direction halloo just after the first two shots, but could not say whether it was a cry of distress or not. Witness was about half a mile distant from where Smith's body was found.

D. J. Rowe, sheriff, speaking of the Winchester gun found near Smith's body, said it had been struck under the barrel by a bullet which tore away a part of the stock. The bullet ranged across the barrel, and struck almost centrally on the magazine. According to this and other witnesses, the gun, when thus struck, could not have been presented, but must have had the muzzle turned upward.

J. J. Wynn, for the State, testified that about the middle of the fatal afternoon he saw the appellant and his brother Tom riding rapidly in an easterly direction towards their father's house. They were going in a more rapid gait than a lope, and went on to old man Green's. By other testimony the State proved that the horse tracks at old man Green's were back-tracked to the place where the two horses had stood near the body of the deceased.

Mrs. Lydia Green, the appellant's mother, was his first witness. She testified that she lived about a mile from the house of Sam Smith, and was at her home the day he was killed. She had been informed about the place at which he was killed. She heard the firing about the middle of the afternoon, and afterwards saw the appellant and his brother Tom riding towards the house from a westerly direction. They were riding in a

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fast trot or gallop. They rode up to where their father was standing at the bars in front of the house, and they seemed to be scared or excited. Witness heard of the killing of Smith after the middle of that afternoon. A few days previous she saw him near the southwest corner of her husband's field, in some brush near where some large posts had been put up. The Green boys were then grubbing in the field, and she had taken them some water. Smith was going off, "kinder stooped," through the bushes and from behind a tree. He was about thirty-five or forty yards from the corner of the field, and the boys were some seventy-five yards from the corner, and inside the field. Smith had his gun with him. Appellant and his brother Frank were the boys in the field. Witness was not excited by thus seeing Smith, and did not return to the field and tell the boys, but went on to the house and told her husband, and he went to the field and told the boys. About a week before that occasion, witness's husband had stopped the appellant from plowing to the end of the field nearest the road and brush in the direction of Smith's. Appellant and his brother Tom ate dinner at home the day Smith was killed, and left home about fifteen minutes after two. They went in a northwest direction to hunt for a yearling, and were gone about three quarters of an hour. After they came back Tom loaded his gun. Appellant did not load his gun, which was capped and appeared to have been discharged. It was a muzzle loading gun. Appellant did not take with him his shot pouch or powder pouch when he left to look for the yearling. Witness saw them hanging on the wall after he had gone. He took no pistol with him. He was in the habit of carrying his gun with him. After witness heard the report of fire arms, not more than four or five minutes elapsed before she saw the appellant at the bars in front of the house. After coming home he and Tom remained about half an hour, and then left for De Leon. Tom was riding a bay horse, and the appellant a sorrel which was the larger of the two. When they started to hunt for the yearling they said they were going down on Willow, which route would not take them by Smith's place. Witness was certain they went northwest toward Willow, and did not go southwest towards Sabanno creek, and she was confident they were not gone more than three quarters of an hour.

Bill Green, a brother of appellant, testified that he had stepped the distance to Smith's house from the rocky hill spoken

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of by the witnesses for the State, and he found it to be five hundred and eighty steps. From no point on that knoll could all of Smith's house be seen. The roof and part of the wall and door could be seen from the rocky point. The bars could not be seen from there, nor the space between them and the house or yard. Witness did not think that from the knoll a man could be seen going south or southwest from Smith's house. On Sunday before the killing the witness was on the point of the hill. The trees were then in full leaf. Witness's father put him on the trail made by the horses ridden by appellant and Tom when they left old man Green's on the fatal afternoon. John Hargrove and witness's brother Frank accompanied witness on that trail. It went from old man Green's over on Sabanno creek and to the mouth of Willow; then up Willow and back by the DeLeon and Shinoak road, and thence, after leaving the road, it went to the place where the killing occurred. Where the horses had left the tracks to the north of where Smith's body was found, the witness found a bullet in the south side of a black jack tree, and about seven and a half feet above the ground. That bullet appeared to have come from the direction of the body and towards the point where the horse tracks were. In the afternoon of the killing the witness heard fire arms, and in about an hour afterwards he learned of the killing. He was about half a mile from where the shooting occurred. He was familiar with the sounds made by different kinds of fire arms. The first two shots were close together. The first of those two was a rifle shot; witness was positive it was not that of a shot gun. The second and third reports were those of a shot gun. The witness said there was no "nick" in either of the hoofs of the horses ridden by appellant and his brother Tom. On his cross examination the witness said that previous to taking the witness stand he had never told about finding the bullet in the south side of the black jack tree which stood between the deceased's body and the place north of it where the horse tracks were. On the Sunday before the killing the witness and his brother were near the rocky hill southwest of Smith's house. They were horse hunting, and they found the sorrel horse under the hill and in the direction of Smith's house. There was a bay filly which followed the sorrel horse.

Frank Green, for the defense, testified very similarly to his brother Bill, and added that he heard a conversation at De

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Leon between Smith and Belyeu the day before the killing, in which Smith told Belyeu to "hurry up and put the things in the wagon and we will kill the son of a bitch this evening." Witness told this to Tom and the appellant the same day. There was no such peculiarities in the horses' hoofs as had been described by several witnesses for the State. This witness stated that he also saw the bullet mark in the south side of the blackjack tree spoken of by his brother Bill, but he said the bullet had bounced out. He had never previously told this fact. He ran his knife into the bullet hole about an inch or an inch and a half. His brother Bill and his brother in law Hargrove were present, but he could not say whether they saw him do so. He told them about his doing so. He made no search for the bullet. He denied that either of the heels of appellant's boots was run down at the time of the homicide. "There was no shot marks in line with Mack's tracks to Smith's; the shot marks were all from direction of Tom's tracks." The witness stated positively that he knew that Mack and Tom did not ride from home to the point of rocks southwest from Smith's house. Witness went on a horse to where the horse tracks were found north of the body, and could not from there see a person standing where the body lay. He then went to where the body lay, and from there he could plainly see a man on horseback where the horse tracks were. Finally he stated that from the horse tracks he could, on horseback, see something at the spot where the body lay, but he could not tell what it was. This witness said that his mother, when she saw the deceased with his gun near the corner of the field, came back to the field and told what she had seen. He said it was not true that she went on to the house and first told her husband about it. "When I said that Tom had told me that he had shot Smith, I meant that Tom had told father and mother, and they had told me. Don't think he ever did tell me."

John Hargrove, for the defense, gave, in the main, much the same testimony as did his brothers-in-law, Bill and Frank Green, but denied that Frank told him, or said in his presence, that he had pried into the black jack tree and discovered that the bullet which struck it had bounced out. Witness and his brothers-in-law took no one else with them to trail the horses. From Smith's body a man on a horse from where the horse tracks were would be visible from the hips upward, but a man standing at the body could not be seen from where the horses stood.

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Witness told no one about the finding of the ball in the black jack tree, and never mentioned that fact until in his present testimony.

J. J. Wynn, who had previously testified for the State, was introduced and further examined by the defense as to what transpired after the appellant and Tom rode up to their father's gate or bars in the afternoon of the homicide. He stated that he was about seventy-five yards distant, and old man Green called to him to come by. Witness did so, and old man Green said to him: "My boys have got into trouble with Smith on the hill." Tom spoke up and said that he had killed Smith; that he, Tom, was riding on his horse through the woods and Smith shot at him with his Winchester; that he, Tom, then fired from his horse, jumped to the ground, took a tree on Smith, and ran right up and shot him again. Then the appellant spoke up and said: "Yes, Tom shot him, but Smith shot at him first with his Winchester." Witness went over to Smith's to inform his family. The Green boys did not tell witness where Smith's body was other than "over on the hill." Tom had a breech loading gun, and was working with and unbreeching it. The boys were excited, and Tom was somewhat agitated while making his statement. Appellant's gun was a muzzle loader; witness did not see him load it. Tom did not tell witness of any other shots than those already mentioned Witness asked him if any one else was at the shooting, and he replied that the woods were full of armed men. He said he got right up to Smith, and knew he was dead.

Mrs. Lydia Green, appellant's mother, was introduced by the defense. She denied that either appellant or his brother Tom told Wynn that the woods were full of armed men, and she did not think that Tom said that he went up to Smith and fired on him. She was certain Tom did not tell Wynn that he was on his horse when he fired his first shot, and that he then took a tree on Smith and fired the other barrel at him. Tom did not tell Wynn that he fired his pistols at Smith; but, after he went in the house, he did say that he discharged one of his pistols and part of another. He did not say where he got his pistols. "They said Mack (appellant) did not shoot." Counsel asked witness what Mack did, and she replied "nothing." Being asked whether Mack held the horses, witness replied: "I suppose so; don't know that they said anything about the horses." Mack was wearing his fine boots; they were a number seven or

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eight in size, and no heel was run down. They had since been worn out by appellant's brother Frank. Tom had larger feet than appellant and wore a number eight or nine. Appellant rode the sorrel horse, which was larger than the bay ridden by Tom. The sorrel had no "nick" out of its hoof. On the Thursday evening after the killing the boys (supposedly Bill and Frank Green) told witness they had found where shot from Smith's gun had struck a black jack tree on the east side. When appellant and Tom rode up to their father in front of the house, appellant was in advance, and he told his father that Tom had killed Smith,—that they were riding through the woods when Smith fired on Tom with his Winchester. Appellant did not have on a pistol.

Mrs. Tom Green, appellant's sister-in-law, testified that when Smith was killed she and her husband were living at section house eighteen of the Texas Central railway, for which road her husband was working. On the Monday before the homicide, as she was walking from the section house to old man Green's, the deceased rose up out of the bushes with his Winchester presented. Witness was scared and started to run. Deceased asked her where Tom was. He was eight or ten feet from the road and directly opposite to witness. "He cursed,—said 'd—n it, where's Tom?'" He snapped his gun while he had it presented at witness. This occurred about a quarter of an hour before sunset. Witness told her husband when he returned home the next day about her meeting with Smith, as stated.

Dick Belyeu (alias Bellew), who had already testified for the State, was called and examined by the defense. He testified that a short time before the homicide he had an appointment to meet the appellant at the corner of the field, and was accompanied there by Smith, the deceased, who took with him his Winchester gun. They saw but did not show themselves to the appellant, because he did not come as he agreed to come. Witness does not "propose to answer how he was armed." Witness had never stated in the presence of Jim Crowley that Smith had his gun cocked and said he was just waiting for appellant to get on his (Smith's) land, when he intended to shoot him. Nor did witness tell Wess Bender that Smith and witness went to meet the Green boys, and concealed themselves in the brush, "and when we got there there were so many of them that we thought it was dangerous to tackle them. Bender did not say to me, 'don't you know Smith intended to kill

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Mack Green that evening'; and I did not answer that I did not think that he did that evening, but that I would not say what his future intentions were."

Jim Crowley, a boy who had been living at old man Green's since about a month before Smith was killed, and who had previously lived at Smith's, testified for the defense that he had heard Smith say he would kill Mack Green if he ever got a chance. About two weeks before the witness left Smith's he heard Smith and Belyeu say that they went down to the corner of the field to meet the Greens, and Belyeu said that he had his hand on his pistol, and that Smith had his gun cocked on Tom and Mack, but that there were too many of the Greens. Smith, before witness left him, said he was going to run him off the place. Witness had not talked with the Greens about this case

Wess Bender, for the defense, testified that he was section boss on the railroad, and that Belyeu had worked for him. Since Smith was killed witness asked Belyeu if he did not know that Smith intended to kill Mack Green the evening that he (Belyeu) and Smith went down to the corner of the field. Belyeu replied that he did not think Smith intended to kill Mack that evening, but that he would not say what Smith intended to do after that. He further said that while they were in the brush he rose to "open up" on the Green boys, but that Smith tugged him by the coat and told him to sit down, saying that there were too many of them to tackle. Witness's brother-in-law was indicted for conspiracy with the appellant to murder Smith. Belyeu did not seem to think that Smith intended to hurt the Green boys.

Hill Logsdon, for the defense, testified that on the Saturday or the Monday before the homicide he saw Smith at De Leon. Smith had something wrapped up in a slicker across his lap; it was four or five feet long, or about the length of a Winchester. Smith was talking about the Greens, and said he had come to town to prevent them from running over the young man who was living at his house, and that for his own protection he carried the thing wrapped up in the slicker. He said he was too old to fight with his fists, and that every time he got near the sons of bitches they went off and would not give him a chance. At that time the witness did not know the Greens, but was now "camping" with them, and they were feeding him and paying all expenses. Until about a month before this trial the witness

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told nobody about what he heard Smith say in De Leon, but he informed appellant's brother Bill of it while working with him on the railroad.

After introducing several witnesses who testified that appellant's reputation was good for peacefulness, etc., and that the deceased's was that of a quarrelsome and dangerous man, the defense rested.

For the State, in rebuttal, E. N. Waldrop testified that he was present when Tom Green and appellant came into De Leon and reported the killing of Smith. Witness asked him particularly how it occurred, and Tom replied that he and Mack were riding through the woods when he saw Smith in the act of shooting; that Smith shot and then he shot; that he saw Smith strike his breast, leaning forward; that then he, Tom, jumped from his horse, ran down some thirty yards and fired again. Tom twice said that but three shots were fired, and said that Mack was a witness to the affair. Mack was present and assented to Tom's account of the matter, and sanctioned Tom's statement that but three shots were fired. Mack further said that he was satisfied Smith was dead, but was not certain, as he and Tom did not go nearer Smith than thirty feet.

The State read in evidence the sworn statement made by appellant to the coroner's inquest held the night of the fatal day. It was as follows: "Me and my brother was out cow hunting May 1, 1888. As we come home I saw Sam Smith with his Winchester. He fired on my brother. My brother fired one shot at him while on his horse; then dismounted, advanced to him, Smith. Second shot, my brother was thirty yards from Smith. Smith look like he was falling when my brother fired second shot. Then my brother shot at Smith several times with a pistol. Smith look like he was trying to get his Winchester after falling. My brother had a pistol, 31 caliber. I did not know whether Smith was dead when I and my brother left, or not. Smith fired on my brother without hailing him. My brother was north of Smith when Smith fired on him. The killing taken place in Comanche county, State of Texas." The signature "J. M. Green" appears to the foregoing, and then appears the further statement, to wit: "Gronen (intended for Green) advanced as he shot. Sam Smith went side way ten or twelve feet from where he fell. I, Mack Green, went in three or four feet from Smith when he fell. My brother came in twenty feet of Smith after he fell."

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The State proved that Smith, about a month before he was killed, filed a complaint charging appellant and others with cursing and horse running, etc., around Smith's residence, but the complaint was dismissed on account of some informality or defect. The State introduced a number of witnesses who gave the deceased an excellent reputation for peace and quietude. It incidentally appears that old man Green had died since the homicide.

Many circumstantial details of an equivocal or inconclusive character have been omitted in this report, and also a mass of merely cumulative or corroborative testimony; but it is believed that the material and important evidence has been sufficiently presented.

Hamilton & Presler, and *Lindsay & Hutchinson*, for the appellant, filed an able and forcible brief and argument.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Eleven bills of exception reserved to rulings at the trial by defendant appear in the record, nine of which are, to our minds, so fully, completely and satisfactorily explained by the learned judge in his notes setting forth the attendant facts and circumstances that it would be both a work of supererogation and a useless consumption of time to recapitulate and discuss them in view of those explanations.

The tenth and eleventh bills were saved to the overruling of defendant's motions in arrest of judgment and for a new trial. They first attacked the validity and sufficiency of the indictment, which instrument is in accordance with approved precedents and forms. The latter motion recapitulated all the supposed errors into which the court had fallen during the progress of the trial.

Two of these errors, and the ones most urgently insisted upon in the oral argument and brief of counsel for appellant, are that the court failed and refused to submit murder of the second degree and manslaughter as issues in his charge to the jury in this case. Upon the statements both of defendant and his brother as to how the homicide occurred, and which statements were in evidence, their meeting with deceased was purely accidental and they were justifiable on the ground of

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self defense. According to the testimony of the prosecution, the homicide was a murder by lying in wait—an assassination—and, consequently, murder of the first degree.

These were the only issues in the case, in our view of the facts as shown by the record. This was the view taken by the learned trial judge, and upon the various phases upon which these issues were by the facts required to be submitted we find his charge a full, clear and sufficient exposition of the law of the case.

We have given the record in this case a most thorough and repeated consideration, and we have found no error for which the judgment should be reversed, and it is therefore affirmed.

Affirmed.

Opinion delivered February 16, 1889.

No. 2695.

G. W. WILLIAMS *v.* THE STATE.

1. FRAUDULENT REMOVAL OF MORTGAGED PROPERTY—INDICTMENT—TERMS CONSTRUED.—This prosecution was for removing mortgaged property out of the State, as that offense is defined by article 797 of the Penal Code. In the stead of the statutory word "remove," the indictment uses the word "run." *Held*, that the words are equivalent as the word "remove" is used in the statute. See the statement of the case for the charging part of an indictment *held* sufficient to charge the offense of removing mortgaged property out of the State.
2. SAME—VENUE.—Article 205 of the Code of Criminal Procedure provides that "prosecutions for offenses committed wholly or in part without, and made punishable by law within, this State, may be commenced and carried on in any county in which the offender is found." The mortgage in this case was executed in K. county, where the defendant had possession of the property. He removed the property from said county, and, while en route to Louisiana, was arrested in H. county. Escaping thence, he went into Louisiana with the property. The contention of the defendant is that H., and not K., county, was the county of the venue. But, *held*, that the offense on trial being one that comes within the purview of article 205 of the Code Criminal Procedure, it was properly prosecuted in K. county.
3. SAME—FACT CASE.—See the statement of the case for evidence *held* sufficient to support a conviction for the fraudulent removal of mortgaged property.

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Statement of the case.

APPEAL from the District Court of Kaufman. Tried below before the Hon. Anson Rainey.

The penalty assessed in this case was a term of two years in the penitentiary. The conviction was had under the first count in the indictment, which reads as follows: " * * That G. W. Williams, on or about October 1, 1888, in the county and State aforesaid, with the intent to defraud W. A. Taylor & Brother, a firm composed of W. A. Taylor and George Taylor, did unlawfully run out of said State certain personal and movable property, to wit, one brown mare about eight years old, branded IXL, the said G. W. Williams having heretofore, to wit, on January 27, 1888, executed and delivered to the said W. A. Taylor & Bro. a valid mortgage in writing upon the said above described property, and which said mortgage was at the time of removal of said property a valid, subsisting, unsatisfied mortgage upon said property, and was then owned and held by the said W. A. Taylor & Bro.; against the peace and dignity of the State."

The State introduced in evidence the mortgage referred to in the indictment, which, besides the horse mentioned therein, described two other horses and a two horse wagon, and crops to be raised by the mortgager. The execution of the mortgage was proved by the mortgagee and the attesting witness, and the former testified that at the time the defendant left Kaufman county with the property described in the mortgage (except the crops), no part of the debt to cover which the mortgage was executed, was paid.

Demasters testified that defendant lived at his house, and made crops on two places in the year 1888; that, not having told witness he was going to leave, nor where he was going to, the defendant, one evening in September, 1888, while witness was absent from home, loaded all of his household effects on the wagon described in the mortgage, and, with the three horses described in the mortgage (the animal described in the indictment being one of them), and the said wagon and household effects left witness's house. The witness, on the same evening, informed the Messrs. Taylor that defendant had gone.

Fields testified, for the State, that acting for Taylor & Brother, he pursued the defendant, and finally brought back the brown mare and other two horses and wagon, which he delivered to the Taylors. The defendant was arrested at Wascom

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station in Harrison county, on a telegram sent ahead by witness, and was in custody with the property at the quarantine camp when witness reached Wascom. Defendant, however, escaped into Louisiana, riding the brown mare, and leaving the other property in the quarantine camp. He was pursued by deputy sheriff Pannell, who soon returned with him and the mare to Wascom, where Pannell delivered the mare to the witness.

Deputy sheriff Pannell testified, for the State, that he reached Wascom, in Harrison county, about a mile from the Louisiana line, just after defendant's escape. He pursued defendant to Jewella, Louisiana, in company with a Louisiana officer. The defendant was then in a house, and the brown mare was grazing in a peach orchard. The Louisiana officer told the defendant that he wanted him to go with him, the officer, and witness, to Wascom, and identify the property. Defendant agreed to and did go back with them to Wascom, where he was turned over to witness by the officer. Witness then turned the property over to Fields, and took defendant to Kaufman. The defense introduced no evidence.

Manion & Huffmaster, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This is a conviction under article 797 of the Penal Code. Instead of alleging in the language of the statute that the defendant did "remove" the property out of the State, the indictment alleges that he did "run" it out of the State. The word "run" in the connection in which it is used in the indictment is, we think, equivalent to the statutory word "remove," and we therefore hold that the use of "run" instead of "remove" does not render the indictment bad. (Willson's Cr. Stat., sec. 1955.) In all respects we hold the first count in the indictment, the count upon which the conviction was had, to be sufficient.

It appears from the evidence that the mortgage upon the horse in question was executed in Kaufman county, and that defendant had possession of the horse in said county. He removed said horse from said county, going in the direction of Louisiana. When he reached Harrison county, and was in one mile of the boundary line between Texas and

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Opinion of the court.

Louisiana, he was arrested by quarantine authorities and while being held in custody by said authorities he escaped, taking said horse with him into the State of Louisiana.

It is contended by counsel for defendant that the venue of the offense is in Harrison and not Kaufman county. There is no provision of statute specifically declaring the venue of this offense. In Roberson v. The State, 3 Texas Court of Appeals, 502. where the prosecution was for *selling* mortgaged property, it was held that the venue of such offense was in the county where the sale was made, irrespective of where the lien upon it was executed, or where the property was removed from. That decision, however, is not applicable to the question before us.

There is a general provision of our Code as follows: "In all cases except those enumerated in previous articles of this chapter, the proper county for the prosecution of offenses is that in which the offense was committed." (Code Crim. Proc., art. 225.) But this article does not apply in this case, because the offense can not be said to have been committed—that is *completed*—in any county in this State. It was not an offense to remove the horse from Kaufman to Harrison, or any other county in this State. No offense was committed until the horse had been removed out of this State.

This offense is one which we think comes within the meaning of article 205 of the Code of Criminal Procedure, which reads: "Prosecutions for offenses committed wholly or in part without, and made punishable by law within this State, may be commenced and carried on in any county in which the offender is found." This offense is one which can not be committed wholly within this State, but must be committed partly without this State, because the property must be removed out of the State before the offense is complete. There is no more reason for holding that the offense was committed in Harrison than in Kaufman county. It was not and could not be committed wholly within this State, and but for the article of the code last cited, could not be prosecuted in any county in this State. It was certainly not the intention of the Legislature to denounce an offense over which the courts of this State could not exercise jurisdiction. We do not think we are giving article 205, above cited, a strained or unreasonable construction in making it applicable to this case. On the contrary, we think the plain meaning of that article embraces this particular offense, as

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well as others of a similar character, where there is no special provision controlling. We hold, therefore, that this prosecution was properly commenced and maintained in Kaufman county.

As to the evidence, we think it sustains the conviction. The issue of fraudulent intent was fairly and fully submitted to the jury by the charge of the court, and the jury were well warranted by the evidence in concluding that such intent on the part of defendant existed and accompanied the act of the defendant in removing the horse out of this State.

We find no error in the conviction, and the judgment is affirmed.

Affirmed.

Opinion delivered February 20, 1889.

27 262
29 236

No. 2536.

WILLIAM DAVIDSON *v.* THE STATE.

1. OCCUPATION TAX.—An employe who follows the occupation of selling inhibited liquors when the tax imposed by law has not been paid is, equally with his principal, amenable to article 110 of the Penal Code.
2. SAME—PENALTY—CHARGE OF THE COURT.—The minimum punishment for pursuing an occupation taxed by law without having first obtained necessary license, is a fine of not less than the tax imposed upon such occupation. And as the license of a retail liquor dealer can not issue for a shorter period than one year, the minimum punishment for the violation of the said article 110 is a fine in the full amount of one year's tax upon such occupation. The charge of the court so defining the penalty, it was correct.
3. SAME—PRACTICE—Failing to request instructions to supply omissions in the charge of the court, the defendant in a misdemeanor case can not be heard to complain of such omissions, notwithstanding he may have excepted to the same.

APPEAL from the Criminal District Court of Harris. Tried below before the Hon. Gustave Cook.

The conviction was for following the occupation of a retail liquor dealer, without having first paid the tax levied by law

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on such occupation, etc. The penalty assessed against the appellant was a fine of four hundred and fifty dollars.

The proof showed that Alfred Sterne owned the Globe saloon in Houston, in which saloon intoxicating liquors were sold by the drink, and that said Sterne had never paid the tax levied on the occupation of selling said liquors, nor obtained license to pursue the same; that the defendant was merely employed as a bar tender in that saloon; that as bar tender he had nothing to do with the procuring of license or payment of taxes, and that as such bar tender he sold said liquors at retail, and, acting for Sterne, he received pay for the same.

W. H. Crank, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. An employe who follows the occupation of selling inhibited liquors when the occupation tax has not been paid, violates article 110 of the Penal Code, and is subject to prosecution and punishment therefor equally with his principal. (LaNorris v. The State, 13 Texas Ct. App., 33; Tardiff v. The State, 23 Texas, 169.)

For pursuing an occupation taxed by law without first obtaining a license therefor, the minimum punishment is a fine of not less than the taxes imposed upon such occupation. (Penal Code, art. 110.) Upon the occupation of retail liquor dealer, the taxes imposed are for a whole year, and can not be for a shorter period of time. (Sayles's Civ. Stats., arts. 4666, 4668.) It follows, therefore, that upon a violation of article 110 of the Penal Code by pursuing the occupation of retail liquor dealer, the minimum punishment is the full amount of one year's taxes upon said occupation. (Fahey v. The State, ante, 146.) There was no error in the charge of the court as to the punishment.

This prosecution being for a misdemeanor, the defendant can not be heard to complain of an omission in the charge of the court, although such omission was excepted to, he having failed to request an instruction supplying such omission. (Willson's Crim. Stats., sec. 2363.)

There is no error in the conviction, and the judgment is affirmed.

Affirmed.

Opinion delivered February 23, 1889.

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No. 2654.

WILEY SCOTT *v.* THE STATE.

1. SWINDLING—INDICTMENT.—See the statement of the case for an indictment *held* sufficient to charge swindling.
2. SAME—CHARGE OF THE COURT—EVIDENCE.—The swindling was alleged to have been committed by means of a false written instrument and the false declaration of the accused that the names appearing to the same were genuine signatures. The trial court charged the jury in effect that before they could convict they must find that the signatures were on the instrument when it was delivered by the accused, and that he then falsely and fraudulently declared that they were genuine, and so induced the issuance of the draft. *Held*, that the instruction was correct in principle, and applicable to the charge in the indictment and the facts in evidence. But see the statement of the case for evidence upon which it is *held* that the verdict of guilty is contrary to both the instruction and the proof.

APPEAL from the District Court of Montgomery. Tried below before the Hon. James Masterson.

The charging part of the indictment reads as follows: "* * That heretofore, to wit, on the twentieth day of September, in the year of our Lord 1886, in the county of Montgomery, in the State of Texas, Wiley Scott did then and there, intending to cheat and defraud Hartley Free School Community No. 70, in and for Montgomery county, in the State of Texas, knowingly, fraudulently and deceitfully present to J. M. Lewis, who was then and there county judge in and for said county and State, and who was by virtue of his said official position then and there had the supervision of the disbursement of the funds belonging to the public free school communities of said county of Montgomery, in said State of Texas, which the said Wiley Scott then and there well knew, a certain false, fraudulent and deceitful written petition or request addressed to county judge of Montgomery county, requesting said official to appropriate sixty-one dollars and forty cents out of the funds of said school community to build a school house for said school community with the following names, to wit, 'Sine,' 'Thompson' and 'Hubert' attached thereto as signers, which the said Wiley Scott then and there falsely and fraudulently represented to the

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Statement of the case.

said J. M. Lewis, county judge as aforesaid, to be the genuine signatures of Canby Sims, Henry Hubert and Joe Thompson, who were then and there trustees of said school communities, and as such were by law authorized to make such requests, which said false, fraudulent and deceitful written request or petition is in substance, words and figures as follows, to wit:

'To County Judge Montgomery County:

'We respectfully ask that sixty one & $\frac{40}{100}$ dollars be appropriated for building School House out of free school funds belonging to Hartley School Community No 70.

'Sine
'Hubert
'thompson

And the said Wiley Scott did then and there falsely, fraudulenly and deceitfully represent to the said J. M. Lewis, county judge as aforesaid, that said false, fraudulent and deceitful request or petition aforesaid, which the said Wiley Scott then and there produced and presented to the said J. M Lewis, county judge as aforesaid, was the written request or petition of the trustees aforesaid of said school community; that said trustees aforesaid signed the same as such trustees, and the signatures attached to said false, fraudulent and deceitful petition or request were placed on the same by the trustees aforesaid as their signatures; that said trustees had authorized him, the said Wiley Scott, to receive from said county judge as aforesaid, any draft or order that said official, in compliance with said false pretended request, might draw on the funds of said Hartley school community aforesaid—all of which said representations then and there knowingly made by the said Wiley Scott were false, and the said Wiley Scott then and there knew that the same were false. In fact and in truth the said false, fraudulent and deceitful written petition or request was not the petition of the trustees of said Hartley free school community aforesaid; and in fact and in truth the trustees aforesaid of the said Hartley free school community had not signed the said false, fraudulent and deceitful written petition or request aforesaid, and the names aforesaid then and there appearing thereon were not in fact and in truth placed there by them; and in fact and in truth the trustees aforesaid had not authorized the said Wiley Scott to receive for them any draft or order

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the county judge aforesaid, in compliance with said pretended, fraudulent and deceitful written petition or request, might draw on the funds belonging to the said school community; and the said J. M. Lewis, county judge as aforesaid, then and there believed that the said pretended, false, fraudulent and deceitful written request or petition, then and there produced and presented to him by the said Wiley Scott, was in fact and in truth a bona fide petition of the trustees aforesaid of the Hartley public free school community aforesaid for his approval of an appropriation for sixty-one dollars and forty cents to build a school house for said community, and then and there believed the false, fraudulent and deceitful representations aforesaid, then and there knowingly and falsely made to him by the said Wiley Scott aforesaid to be then and there true; and the said Wiley Scott, then and there, by the said false and fraudulent and deceitful pretense, pretenses and representations so made to the said J. M. Lewis, county judge as aforesaid, did unlawfully and fraudulently acquire from the said J. M. Lewis, county judge as aforesaid, an order signed by him as county judge aforesaid, directing the Treasurer of Montgomery county, State of Texas, who was then and there by virtue of his official position the custodian of the funds belonging to the communities of the public free schools in said county and State, to pay to bearer or any one of the trustees, sixty one & $\frac{40}{100}$ dollars out of the funds belonging to the said Hartley free school community aforesaid, which said order is in words, substance and figures as follows, to wit:

'The Treasurer of Montgomery County is respectfully requested to pay the above amount $61.40 to the bearer or any one of the trustees of Hartley School Community No. 70, and charge the same to said Community.

'J. M. LEWIS,
'Co. Judge, Montgomery Co.'

Which the said J. M. Lewis then and there signed and delivered to the said Wiley Scott, believing that said false, fraudulent and deceitful written petition or request, then and there produced and presented to him by the said Wiley Scott, was a genuine and bona fide request and petition of the aforesaid trustees of the said Hartley Free School Community in compliance therewith, and he would not then and there have signed

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and delivered to the said Wiley Scott said order if he had not then and there believed that the said false, fraudulent and deceitful request or petition was the bona fide request or petition of the trustees of said community, and that the false, fraudulent and deceitful representations then and there made to him by the said Wiley Scott were true; which said order is an instrument in writing conveying and securing a valuable right of the value of sixty-one dollars and forty cents, which he, the said Wiley Scott, then and there so unlawfully and fraudulently acquired, with the intent to appropriate the same to the use and benefit of him, the said Wiley Scott, and with the wilful design to cause an injury to the said Hartley School Community No. 70 aforesaid; and the grand jury aforesaid, upon their oaths aforesaid, do say and present in said court that the said Wiley Scott, at the time and place aforesaid, and in the manner and by the means aforesaid, did commit the offense of swindling, contrary to the statute in such cases made and provided, and against the peace and dignity of the State." The trial of the defendant resulted in his conviction, and his punishment was assessed at a term of two years in the penitentiary.

The State introduced in evidence the "request," or "petition," as it is designated and set out in the indictment, and the order of the county judge, as the same appears transcribed in the indictment, and then proved by the trustees of the Hartley school community, viz.: Sims, Hubert and Thompson, that neither of them signed the same, nor authorized any person to sign the same for them.

Ex-County Judge Lewis was next introduced as a witness by the State. He testified, in substance, that the body of the "petition," or request, as appears by the handwriting, was written by him. He did not know who signed the names of Sims, Hubert and Thompson to the same. The witness also wrote the order on the county treasurer, as the same appears in the indictment. He customarily wrote such petitions for the negro trustees of negro school communities, or the patrons thereof, and when properly signed or authenticated by the trustees, or he was satisfied of their genuineness, he drew his official orders on the same. He remembered that defendant afterwards presented him the petition, and while he did not think he would have drawn the check on it if not signed, he was now unable to say that the purported signatures of the trustees were then on it. It was, in fact, as probable that they

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were not as that they were. He could not now say what, if any, representations were made to him by defendant about those signatures, or whether he was induced by defendant's representations to issue the check or order. He would not, however, have issued it if he was not satisfied in his own mind that the money was wanted by the trustees for the purpose stated in the petition.

It was further proved that the defendant sold the order to one Caldwell, and that the money called for in it was paid to Caldwell by the county treasurer. The defense offered no evidence.

No brief on file for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. We think the indictment is a good one, as it alleges every element of the offense of swindling, and sets out in *haec verba* the instrument in writing by means of which it is alleged the offense was accomplished.

Among other instructions given the jury was the following, given at defendant's request: "Unless the proof satisfies you beyond a fair and reasonable doubt that the signatures to the document in evidence before you were there at the time of its presentation to the county judge, and that defendant's false and fraudulent declaration that they were genuine signatures induced the issuance of the draft in question, then the defendant is entitled to be acquitted." This instruction was applicable to the charge in the indictment and to the facts in evidence, and is correct in principle. But, in our opinion, the verdict is contrary to said instruction, and unwarranted by the evidence. It appears from the testimony of Lewis, the county judge, that he had no definite recollection about said signatures, as to whether or not they were on the document when it was presented to him. He states that it was as probable that they were not, as that they were on said paper at said time. He states further that he does not remember any statement or declaration made to him by defendant in regard to said signatures or said document.

Because, in our opinion, the verdict is against the law and unsupported by the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered February 27, 1889.

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Statement of the case.

No. 2670.

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27 269
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DANIEL DEMPSEY v. THE STATE.

1. MALICIOUS PROSECUTION — INFORMATION.—In a criminal action for malicious prosecution under article 273 of the Penal Code, it is not essential that the information shall allege that the prosecution against the injured party had ended before the information was presented. See the opinion for an information *held* sufficient to charge such a malicious prosecution as constitutes the offense defined in said article 273.

2. SAME.—To authorize a conviction for malicious prosecution, the proof must show that the prosecution alleged to be malicious was actuated by malice.

3. SAME—TERM DEFINED—"LEGAL MALICE."—"Any unlawful act done wilfully and purposely to the injury of another is as against that person malicious; this wrong motive, when it is shown to exist, coupled with a wrongful act, wilfully done to the injury of another, constitutes legal malice."

4. SAME.—Not only must the proof show that the alleged malicious prosecution was actuated by legal malice, but it must show a want of probable cause for instituting the alleged malicious prosecution. By probable cause is meant the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted. Under this rule a prosecution, although instituted with legal malice, would not be a penal offense if probable cause existed to believe the offense charged was committed by the party prosecuted. See the opinion on the question; and note that in this case though legal malice existed, probable cause also existed.

5. SAME—EVIDENCE.—On the trial, the court below permitted the justice of the peace before whom the alleged malicious prosecution was had to testify that he discharged the alleged injured party, because, in his opinion, the evidence did not support the charge brought against him. *Held*, error.

APPEAL from the county court of Jackson. Tried below before the Hon. J. S. McNutt, County Judge.

This conviction was for malicious prosecution, and the penalty assessed against the appellant was a fine of one hundred dollars. The opinion sets out the charging part of the information.

The testimony shows that the prosecuting witness, Tom

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Kelley, lived with his father in a house and on land rented from the defendant; that defendant and Tom Kelley mutually disliked each other, and had frequent quarrels about trivial matters; that Tom Kelley's father was prohibited, by written contract, from turning live stock into the pasture of the defendant. One Tatum went home with Tom Kelley one night, and, after removing the saddle from his horse, staked him in defendant's pasture, Tom Kelley going with him when he did so. According to Tom Kelley, Tatum staked his horse in the pasture without the consent or suggestion of him, Tom Kelley, and likewise without any protest from him. For the staking of that horse in the pasture by Tatum, Tom Kelley was prosecuted by defendant. According to Tatum he staked the horse in the pasture after Tom Kelley said something about it being dangerous to stake him outside. On the next morning defendant asked him who staked the horse in the pasture. He replid that he did, against his judgment, and that Tom Kelley had nothing to do with it; that he was alone responsible. Defendant replied that if witness staked the horse in the pasture it was all right, but that if Tom Kelley did, it was not. The justice of the peace testified that defendant prosecuted Tom Kelley before him for staking a horse in his pasture, and that he dismissed the prosecution because the evidence did not support the charge.

J. D. Owen, for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This prosecution is under article 273 of the Penal Code, which reads: "If any person in this State, for the purpose of extorting money from another, or the payment or security of a debt due him by such other person, or with intent to vex, harass or injure such person, shall institute or cause to be instituted any criminal prosecution against such other person, he shall be deemed guilty of malicious prosecution, and, upon conviction, shall be fined not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not less than one month nor more than one year." This article of the Penal Code is an addition to the original Code made in revising, and this is the first conviction thereunder which has been before this court.

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Opinion of the court.

In the information the charge is alleged as follows: "did then and there unlawfully, for the purpose and with the intent to vex, harass, and injure one Thomas Kelley, wilfully institute and cause to be instituted against the said Thomas Kelley, in justice's court of precinct number one, of Jackson county, Texas, a criminal prosecution as follows, to wit: 'The State of Texas v. Thomas Kelley, number eighty three,' charging the said Thomas Kelley by complaint made before H. T. Chivers, county attorney of said county, which complaint was filed by William Payson, the justice of the peace in and for said precinct number one, with unlawfully and wilfully tying and staking out, and causing to be tied and staked out, to graze within the enclosed lands of the said Daniel Dempsey a horse."

We are of the opinion that the information is a good one. It follows the words of the statute, and is sufficiently specific. The specific exception made to it, that it does not aver that the prosecution against Kelley had ended before the presentment of the information, is not well taken, as the statute makes no such requirement. In a civil suit for damages for malicious prosecution, it is essential to allege and prove that the alleged malicious prosecution had terminated before the institution of the suit, because in such case it can not be known whether or not there was any injury until there has been an acquittal of the charge, nor what the extent of the injury might be. And a civil suit is not maintainable at all if there has been a conviction upon the criminal charge. (Glasgow v. Owen, 6 S. W. Rep., 527 (Texas); McManus v. Wallis, 52 Texas, 535; Usher v. Skidmore, 28 Texas, 617; 2 Greenl. Ev., sec. 452; Cooley on Torts, sec. 186.) But it does not appear to us that the above stated rule is applicable in the case of a criminal prosecution under article 273 of our Penal Code. In such case, we think it is immaterial whether or not the alleged malicious prosecution had terminated at the time of the filing of the indictment or information. The reason for the rule in a civil suit does not exist in the criminal case, and it does not seem to be contemplated by said article that it shall exist in such case.

There are certain rules, however, governing in a civil suit for malicious prosecution which, in our opinion, obtain in a criminal prosecution such as the one before us. These rules are not expressly declared or required to be observed by article 273, but they are, nevertheless, within the intention of that

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article. The first of these rules is that the prosecution alleged to have been malicious must be proved to have been actuated by malice. Legal malice is defined to be "any unlawful act done wilfully and purposely, to the injury of another, is, as against that person, malicious; this wrong motive, when it is shown to exist, coupled with a wrongful act, wilfully done to the injury of another, constitutes legal malice." (Ramsey v. Arrott, 64 Texas, 322; Glasgow v. Owen, 6 S. W. Rep., 527, Texas.)

The second rule is, that there must not only be legal malice actuating the wrong done, but there must be a want of probable cause for instituting or causing to be instituted the alleged malicious prosecution, and the evidence on the trial must show such want of probable cause. "By probable cause is meant the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted." (Ramsey v. Arrott, 64 Texas, 322; Glasgow v. Owen, 6 S. W. Rep., 527 (Texas); Gabel v. Weisensee, 49 Texas, 131.)

In this prosecution, therefore, as we construe the statute creating this offense, it was essential for the State to prove, 1. That the defendant instituted or caused to be instituted against Kelley the prosecution named in the information, being actuated thereto by malice, with the purpose and intent to vex, harass and injure said Kelley. 2. That he instituted or caused to be instituted said prosecution without probable cause, as that term has been above defined.

It is certainly not the meaning and intent of the statute to punish one for prosecuting supposed crime, who does so with probable cause, although he may do so for the purpose of vexing, harassing and injuring the person prosecuted. To otherwise construe the statute would, it seems to us, make it operate against public policy. It would deter citizens from commendable efforts to bring criminals to justice. A man would fear to institute a prosecution, however meritorious it might be, knowing that he might himself be prosecuted and punished merely upon proof that he instituted it for the purpose and with the intent to vex, harass and injure the prosecuted party, without regard to the evidence of such party's guilt of the charge.

As we understand the statute, it is intended to punish a person who, without probable cause, actuated by malice, not in

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good faith, institutes a criminal prosecution against another for the purpose and with the intent to vex, harass and injure such other person. It is intended to prevent groundless prosecutions, and not such as there is legal evidence to justify a reasonable belief that the person prosecuted is guilty of the crime charged.

In this case, while the evidence is perhaps sufficient to show that the defendant was actuated by malice—by a purpose and intent to vex, harass and injure Kelley by the criminal prosecution—it further shows that he had probable cause for instituting such prosecution. It shows that Kelley was a principal in the offense of staking out the horse in the defendant's inclosure, and was, in fact, guilty of the charge preferred against him in the alleged malicious prosecution. We are of the opinion, therefore, that this conviction is unwarranted by the evidence and the law.

We are further of the opinion that the court erred in permitting the justice of the peace to testify that, in the alleged criminal prosecution against Kelley, he discharged said Kelley because, in his opinion, there was not sufficient evidence to sustain the charge. We think the result of that prosecution was immaterial, and the opinion of the justice of the peace as to the sufficiency of the evidence was clearly incompetent and calculated to injure the defendant.

For the errors mentioned, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered February 27, 1889.

No. 2678.

LOUIS HAWKINS v. THE STATE.

1. PRACTICE—INCOMPETENT WITNESSES.—Subdivision 3 of article 780 of the Code of Criminal Procedure denounces as incompetent to testify in criminal actions, "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath."

2. SAME.—There is no precise age under which a child is deemed incompetent to testify, but when under fourteen years of age competency is

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determinable by an examination, and the action of the trial court thereon will not be revised in the absence of a showing that its discretion was abused, and unless an abuse of discretion is apparent. The objections to the witness in this case are solely as to his youth and ignorance. His examination disclosed that while he inadequately, if at all, understood the obligation of an oath, he knew that it was right to speak the truth and wrong to speak falsely. He was held competent and testified, and his narrative of the facts within his knowledge was not merely clear, concise, positive and intelligent, but was corroborated by physical facts discovered and detailed by other witnesses. *Held*, that in holding the witness competent, the trial court did not abuse its discretion.

3. SAME—IMPEACHING TESTIMONY.—The wife of the deceased, who had been previously tried for complicity in the same offense, and had been acquitted, testified for the defense on this trial, and, to impeach her testimony, the State was permitted to prove contradictory statements previously made by her. The objection urged to this by the defense was that she was under arrest at the time she made the said contradictory statements, and that the evidence was hearsay. *Held*, that the objection was properly overruled. Articles 749 and 750 of the Code of Criminal Procedure, excluding confessions made in duress, apply only to the confessions or admissions of *a defendant who is on trial*, made when under arrest, and they can not be extended to parties not on trial. Whilst hearsay so far as the defendant was concerned, the said contradictory statements were admissible to impeach the witness, to which sole purpose they were properly limited by the charge of the court.

4. PRACTICE—NEW TRIAL.—In support of the motion for new trial, the defense filed the affidavit of a third person to the effect that after the trial of Sarah Washington, for the same offense, and before the trial of the defendant, one of the jurors who tried the defendant, said that the said Sarah Washington should have been awarded the death penalty, and that the testimony on her trial and that on the trial of defendant was essentially the same. The counter affidavit of the impugned juror affirms that he had no recollection of making the statement imputed to him, and that, if he made it, he made it in jest, and that he tried the defendant without bias or prejudice, and solely upon the evidence adduced and the law given in charge. *Held*, that the motion for new trial was properly overruled.

5. MURDER—FACT CASE.—See the statement of the case for evidence *held*, although circumstantial, to be sufficient to support a capital conviction for murder.

APPEAL from the District Court of Falls. Tried below before the Hon. Eugene Williams.

The death penalty was assessed against the appellant upon his conviction in the first degree for the murder of Addison

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Statement of the case.

Washington, in Falls county, Texas, on the twenty-sixth day of September, 1887.

Minerva Huddleston, the mother of the deceased, was the first witness for the State. She testified that the deceased was killed at his home on the Battle farm, on the east bank of the Brazos river, in Falls county, Texas, on the twenty-sixth day of September, 1887. Deceased's family at that time consisted of his wife, Sarah, whom he married in the preceding June, his infant daughter by a former wife, and Willie Bibb, a youth ten or eleven years old. The witness had lived with deceased since his marriage until two or three weeks prior to his death. Sarah Washington, previous to her marriage with deceased, had lived in adultery with the defendant. Deceased and Sarah lived contentedly as man and wife, having, so far as witness ever discovered, no trouble other than occasional conjugal spats that are inseparable from the married state. A few days before the witness left the deceased's house, Sarah went to Hickerson's farm, where the defendant was at work, and remained there all evening. Deceased was not at home on that day.

Willie Bibb testified, for the State, that he was living with the deceased at the time he was shot and killed. The fatal shot was fired into the house through a window on the east end of the house and took effect in the back of the deceased, who was sitting at the supper table, eating, with his back toward the said window. It was then about dusk or "first dark." Just before sundown the witness and the deceased went to the river, fishing, but remained only a short time. They merely baited their hooks and set them out in the river, and then returned to the house, each with a "turn" of wood. They found Sarah Washington on the bed, complaining of being sick. Deceased made a fire, cooked supper, put it on a table in the corner of the room, sat down at the table, with his back to the east window, and began to eat, when a shot was fired into the room through the said window. Deceased fell back, but not out of the chair, uttered a single cry—"Oh"—and expired. The shot frightened and confused Sarah Washington and witness, who, after a few moments of inaction, fled from the house through the south door, and over a little path around the corner of the house to the house of Mr. Henry Hickerson. As the witness passed the corner of the house, in the wake of Sarah, he saw a man, whom he took to be the defendant, running from the vicinity of the house toward the slough, and over the trail that

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crossed the slough just back or north of the house. That man, who had a gun in his hands, fell into the slough, and used his gun in getting up.

Continuing his testimony, this witness stated that he knew the defendant well, having lived with him when he and Sarah Washington lived together as man and wife. The defendant was crippled in his left foot and limped in walking or running. He owned a musket gun when the witness lived with him. A short while before he and the deceased went fishing on the fatal evening, the witness went to the point in the rear of the house near where the slough empties into the river, to dig bait, and while digging bait he saw the defendant squatted behind a "clump" of willow bushes that had grown up around a stump. He then had a gun in his hands. He was between twenty and thirty steps distant from the witness, but did not speak to him. When the witness went back to the house a few minutes later he told his aunt, Sarah Washington, about seeing defendant behind the stump with a gun in his hands, and the said Sarah told him that if he told anybody about it she would whip him. As a consequence, being afraid of his aunt Sarah, he did not tell the deceased about seeing defendant behind the stump. The killing occurred on Monday night. On the previous Sunday the witness visited the Rickelman farm, and there met the defendant. When he started home defendant stopped him and told him to tell Sarah to bake him a cake, and that he would come to her house after it on the first rainy day or night. The witness delivered the message. The day of the killing was the first rainy day that followed. Witness frequently heard the deceased and Sarah quarreling about the defendant.

On his cross examination, the witness stated that deputy sheriff John T. Barlow came to the house of the deceased on the morning after the tragedy and made an examination of the premises and vicinity. Mr. Barlow asked witness if he knew who killed Addison Washington, and witness told him that he did not; to which Mr. Barlow replied that he believed the witness did know; cursed and swore at witness, and finally told him that if he did not tell who did the killing, a mob would come and hang witness; but that if witness would tell, he, Barlow, would see that witness was not hurt. The witness became frightened and told Barlow the facts to which he has testified on this trial. Re-examined, the witness said that a few days after the killing of deceased, he went to the place of

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the deceased with justice of the peace Elam, and pointed out to him the place where he dug the fish bait, and the place where he saw the defendant squatted behind the stump. After telling Barlow what he knew about the killing, the witness told him that he was afraid to stay in the bottom among the negroes, and asked to be placed in the care of the whites pending the trial of the defendant. At his request he was then placed in charge of Mr. John Stuart, whom he had known at Hearne. He remained with Mr. Stuart until the former trial of defendant, since when he had lived with Sam Patillo, who was the husband of one of his aunts. The witness was afraid of his aunt Sarah Washington, and refused to testify on the examining trial until she was removed from the court room.

John T. Barlow testified, for the State, that he was a deputy sheriff of Falls county at the time Addison Washington was killed. He went to the place of the killing—Washington's house—early on the morning after the assassination, arriving before sundown. He found the dead body of Addison Washington sitting in a chair at a table on which were several plates of food, cups and saucers, etc. Saw ten or fifteen slugs and buckshot had penetrated the back and shoulders of deceased. Witness extracted one slug and one buckshot from the body. The witness then made a careful examination of the premises and vicinity. At a point in a slough, just north of the house, the witness discovered a stump surrounded by willow brush, behind which some person had sat. A person sitting behind that stump could not be seen from deceased's house. Near that stump the witness found the tracks of a man and woman. The woman's track led from the house to the stump. Witness trailed the man's track from the stump, along the bank of the slough, to the north side of the house, and thence to the east window of the house, through which it was said the fatal shot was fired. That window was an ordinary glass window from which one of the panes had been broken. A piece of plank was nailed over the broken pane. It did not entirely close it, but left an open space wide enough to admit the insertion of the muzzle of a single barreled gun, but not of a double barreled gun. There was no powder burn on the sides of the said crack or open space. From the window the witness trailed the said track over the trail to the crossing of the slough, where the ground showed that the man had fallen. At this same place the witness found the unmistakeable impression of the muzzle

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of a single barreled gun. It had rained on the previous day, leaving in the slough a bed of red colored mud, but no water. The track showed to have been made by a man crippled in the left foot or leg, the left stride, although the man was running, being much shorter than the right stride, and the ball only of the left foot making a clear impression, while the impression of the right foot was perfect, clear and distinct. Witness trailed that track a considerable distance up the Brazos bottom, and then, leaving others to follow it in all of its meanderings, he went to the house of Tennessee Stephenson, where he secured the defendant's single barreled musket. He soon afterwards found and arrested the defendant in a house a few hundred yards distant from Tennessee's house.

While following the trail of the man, between the place of the homicide and the house where he arrested defendant, the witness found a point where, as shown on the ground by the impression of the butt of the gun, the tracks and fragments of newspaper scattered about, the party stopped and loaded the gun. The trigger guard, barrel and butt of the defendant's gun showed distinct mud signs when witness secured it, and it showed plainly that it had been grasped in muddy hands, the skin creases of the hand even showing. The witness took that gun to Jack Brewer, the gunsmith, and had the load withdrawn. Brewer first drew from the gun a piece of newspaper wadding, then buckshot, then some powder, and from beneath this powder he took other powder mixed with mud. The substance nearest the tube was almost wholly moist or wet mud, similar in color to the mud in the slough near the deceased's house where the man fell down. The gun in its then condition could not have been discharged. There was a fresh "hat" or musket cap on the tube, and the appearance of the barrel at the muzzle indicated to the witness, who was a fire arm expert, that the gun had been recently discharged. The high weeds between the house of the deceased and that wherein the defendant was arrested, along the trail pursued by the fleeing man, were wet from the recent rain, and could not have been passed through without wetting the traveler.

After arresting the defendant the witness returned to the house of the deceased, where he met Willie Bibb, a negro boy about ten or eleven years old. He asked Willie who killed Addison Washington. He replied that he did not know. The witness told him that he was satisfied he did know; that he,

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witness, had found his, Willie's, track at a place in the slough near the stump behind which the party had sat, and where evidently he, Willie, had been digging fish bait; that he, Willie, would not be hurt if he would tell what he knew about the killing, but that he, witness, would hang him if he did not tell who did the killing and who made the tracks behind the stump. Thereupon Willie Bibb told the witness substantially the same facts he has testified to on this trial. Willie Bibb then told the witness that, having disclosed what he knew, he was afraid to remain in the bottom with the negroes, and asked to be placed in the care of the whites, and at his further request he was placed with John W. Stuart. He afterwards stayed in turn with Justice of the Peace Elam, J. R. Bates and Sam Patillo's wife. The witness observed on the examining trial that Willie Bibb would weep, in evident fright, instead of replying to questions, until Sarah Washington was removed from the court room, when he related in detail the narrative he has related on this trial. Witness arrested Sarah Washington immediately after he secured the statement of Willie Bibb, on the morning after the murder, and sent her to the Marlin jail in the custody of Burrell Young and Tom Sanders. It was before the arrest of Sarah Washington that witness found the woman's track near the stump mentioned. He then got a new pair of woman's shoes from deceased's house and applied them to the said tracks (which appeared to be fresh). The shoes and the tracks were about the same in length, but otherwise the fit was not perfect. He then returned to the house and got an old pair of woman's shoes, the sole of one of which was whip-sewed to the upper with a piece of fishing line or small wire—witness did not remember which. He applied those shoes to the said tracks and found them to correspond perfectly, the tracks even showing the impression of the fish line or wire. That shoe was slightly run down at the heel, which showed distinctly in the track. Witness asked Sarah Washington who killed Addison, and she denied that she knew anything about the killing. The shot taken from the body of the deceased were larger than the shot extracted from the gun.

Tennessee Stephenson testified, for the State, that she lived on the Parker place about two miles from Marlin. The defendant boarded with the witness in September, 1887, occupying the small shed room which adjoined witness's room. A drizzling rain fell on the morning of September 26, 1887, and early

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on that morning the witness's son, Hiram Robinson, and the defendant left witness's house to go deer hunting. Her said son did not return home until the next day. The witness remained at home all day on the said September 26, 1887, and knew that defendant did not come back to the house on that day. Dave Berry visited witness that night and remained with her until just before the down train from Waco signalled Marlin, which was at half past ten o'clock. The witness retired immediately after Berry left and went to sleep. She had been asleep some time—she did not know how long—when the defendant awakened her to let him in. She opened the door and he entered with his gun in his hands. After he got to his room he asked witness for some dry clothes, remarking that those he had on were wet. The witness gave him his dry clothes and went to sleep. Defendant was not married. Witness was married, but did not know the whereabouts of her husband.

Hiram Robinson testified, for the State, that he and the defendant left Tennessee Stephenson's house on the morning of September 26, 1887, to go hunting. Defendant did not have his gun at the time, but told witness he had it in Hamp Chisholm's field. He had ammunition, consisting of powder, large buck shot and "hat-caps" for a musket, and while at the house, the witness saw him with some slugs. Defendant got his musket from under some mulberry brush in Chisholm's field. He then told witness to go to the point where some parties were blowing hunting horns, and ascertain if they could join that hunting party, and to meet him at the foot log crossing of the slough. Witness went to the parties blowing the horns, and found that they were not going hunting. He and a boy named Miles then went to the foot log, and not finding defendant, they went hunting. Witness spent that night with Miles and returned home next day.

Deputy sheriff Charles A. Norwood testified, for the State, substantially as did the witness Barlow as to the indications, etc., on the ground about the house of the deceased, as seen by him on the morning after the killing. He measured the track going from the east window, and afterwards applied that measure to the track of the defendant made on the jail floor. The two tracks measured exactly the same. Defendant was lame in the left foot, only the ball of that foot touching when he walked. Defendant's gun was examined by witness on the

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morning after the killing. It had the appearance of having been recently discharged.

James Tolliver testified, for the State, that less than two weeks before the killing of deceased, he met the defendant in Marlin, and, to tease him, asked him: "How are you and Addison Washington getting along since he married your gal?" He replied: "Bad; I have heard that Addison has been threatening me. If he crosses my path, I will set him up in less than two weeks."

Doctor George J. Elam, justice of the peace of the precinct in Falls county in which the murder of Washington occurred, was the next witness for the State. His testimony relating to the dead body, the tracks, etc., about and in the vicinity of the deceased's house, as viewed by him on the day after the killing of Washington, was substantially the same as that of Barlow. He did not, however, find the lame foot track nearer the east window than six or eight feet, but a great many people had been on the ground before he arrived He described the trail from the house substantially as Barlow, including the indications on the ground where the refugee stopped and loaded his gun. This witness observed that the tracks of the man and woman at the willow clump were about five feet apart, and, though fresh, it looked to him like the track of the woman was made before the rain, and that of the man after the rain of the night before. According to this witness, a person standing at the east end of the deceased's house could not have seen the fall of a person in the slough at the point where the fleeing man fell, nor from any point in the path that led to Hickerson's house. Witness followed the lame foot track to the turnpike road within four or five hundred yards of Tennessee Stephenson's house.

On cross examination this witness testified that the boy Willie Bibb was examined before him on the inquest upon the body of deceased. He first testified that he knew nothing about the killing. He was apparently watched by Sarah Washington, and as often as he caught her eye he wept and showed embarrassment. Witness then had Sarah removed from the court room, when Willie Bibb told substantially the same story he has testified to on this trial.

The State closed.

Ned Carter was the first witness for the defense. He testified, in substance that, en route to his home, over the turnpike

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road, he passed Tennessee Stephenson's house about dark on the evening of the fatal day—that being the hour the fatal shot was fired, as fixed by the State's witnesses. When he got immediately opposite Tennessee's house, some person uttered a loud halloo, and the witness felt satisfied that he recognized in that halloo the voice of the defendant; and so informed Ab. Bogin, on the next morning when Bogin told him of the arrest of defendant. Tennessee Stephenson's said house was between four and five miles distant from the house of the deceased. On his cross examination this witness admitted that he drank a great deal in Marlin on the said twenty-sixth day of September, and, as a matter of fact, had a very imperfect recollection of the route he traveled home on that night, and a very indistinct recollection of what he told Bogin on the next day. The witness did not see the defendant on the fatal evening. Bogin corroborated Carter as to the statement made to him by Carter on the morning after the killing.

Sarah Washington, the widow of the deceased, testified, for the defense, that she was at home when the deceased was killed, on September 26, 1887. She had been sick all day. Deceased cooked his supper himself, placed it on the table, and sat down to the table, with his back toward the east window. About that time the witness went to the fire place to get, for the deceased, some potatoes she had put in the ashes to roast. The shot was fired into the house through the east window. The shot startled the witness, who did not at first understand what had occurred. She asked deceased: "What did you do that for?" and then realized that he had been shot and was dead. She then fled from the house, followed by Willie Bibb, passed through the south door, around the east corner of the house, and over a path through the turnip patch to Hickerson's house. It was then about dark. Witness did not see anybody running from the house toward the slough, or in any other direction. She did not see the defendant at any time on the fatal day. Willie Bibb did not tell her afterwards that he saw defendant running from the house towards the slough, after he, Bibb, ran out of the house. Willie did not tell the witness on that evening that he had seen defendant hiding behind a willow stump with his gun, and she did not threaten to whip Willie if he told it. Willie Bibb did not tell her that he saw the defendant on Rickelman's farm on the preceding Sunday, and that defendant charged him to tell her to make him, defendant,

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Statement of the case.

a cake, and that he would come for it the next rainy day, or night. The witness protested that she did not know who killed deceased, and declared that if she did know who the murderer was she would denounce him.

Cross examined, the witness said that for several years prior to her marriage to the deceased she lived with defendant as his wife. She married deceased in June, 1887, having left defendant about three weeks before that time. The defendant begged witness not to leave him and marry deceased, and became angry with deceased about witness. Deceased often quarreled with witness about defendant. It was the witness's shoe that Mr. Barlow took from the house and applied to the track near the stump. The witness had not been about that stump on that day, and could not explain how her track came to be there. Witness went to town after her arrest, in the custody of Burrell Young and Tom Sanders. She had no recollection of telling Sanders, on the way to town, that defendant killed deceased. She had no recollection of telling Sanders that Willie Bibb delivered to her a message from defendant to bake him a cake, and that he, defendant, would call for it on the first rainy day or night. Witness did not know who killed deceased, but, being asked: "Who do you believe killed Addison Washington?" she replied: "I think defendant killed him."

R. Ledbetter testified, for the defense, that, while confined in jail with deceased, some time prior to the latter's death, he heard the deceased say that somebody had threatened his life, and that he was afraid of being killed. At another time he heard Mr. Tom Battle tell deceased to be cautious or he would be killed.

E. Anderson and William Watson testified that they were acquainted with the defendant, and knew his reputation as a peaceable, law abiding citizen, and that it was good. The defense closed.

Tom Sanders testified, for the State, in rebuttal, that he knew the defendant, who was well known throughout the neighborhood by his nickname "Spider." Just before the arrest of Sarah Washington, the witness asked her who killed Addison Washington, and she replied that she did not know. She was afterwards arrested, and was taken to jail by witness and Mr. Young. On the way to town, she spoke of being a member of the church, and addressed witness as "Brother Sanders." Witness replied: "If you are a member of the

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church you ought to tell the truth about this; and if you will tell the truth, Mr. Rice (the prosecuting attorney) will turn you loose, and not put you in jail." She then said that "Spider" killed the deceased. Witness asked her who? and she replied: "Louis Hawkins." In answer to another question by witness, she said that Willie Bibb told her on the previous Sunday that he saw defendant at Rickelman's farm, and that defendant charged him to tell her to bake him, defendant, a cake, and that he would come for it on the first ensuing rainy day or night. Witness then called Mr. Barlow, who was riding along some distance behind, and when he came up Sarah repeated to him what she had said to witness. Just as she was being placed in jail Sarah said that, contrary to witness's assurance, they were going to put her in jail, and that what she had said to witness on the road she would retract because it was a lie. She had just then passed through a large crowd of negroes.

Recalled, later in the trial, this witness stated that he did not use any violence or threats to extort the said statements from Sarah Washington.

John Barlow was then recalled by the State, and corroborated Sanders as to the declarations of Sarah Washington on the road to town.

Sarah Washington, recalled, by the defense, admitted that she made the statements imputed to her by Sanders and Barlow, on the way to jail, but declared that she made them because Sanders told her that Barlow was behind with a rope, and that a mob would be organized and hang her if she did not admit that defendant killed deceased. She thereupon made that and every other declaration Sanders and Barlow required of her, and would have made any other dictated by them, as she was afraid of mob violence. Those statements made by her while in arrest were false, and her present testimony true.

William Shelton testified that he examined the defendant's gun as soon as it and the defendant were brought to jail on the morning after the killing, and before the load was drawn out. The inside of the barrel was rusty, and the witness, who had a great deal of experience with fire arms in the Confederate army, did not think that gun had been recently discharged.

J. R. McDonald and *W. Shelton*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

WHITE, PRESIDING JUDGE. This appeal is from a death penalty inflicted upon a conviction for murder of the first degree.

Several questions are propounded by the bills of exceptions reserved for appellant during his trial. 1. One of the main witnesses for the prosecution was a boy eleven years old, and he was examined at the instance of the defendant, with the purpose of testing his competency as to intelligence, and his understanding of the obligations of an oath. It appears that after his examination by defendant's counsel, he was re-examined by the court, but the statement in the bill of exceptions gives us but a very meagre account of the extent of the examination. He seems to have known but little, if anything, about the obligations of an oath, but he knew that it was wrong to tell a lie, and that it was right to tell the truth. That portion of our statute relative to the matter denounces as incompetent to testify in criminal actions "Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath." (Code Crim. Proc , art. 730, sub-div. 2.)

As stated in the bill of exceptions, the objection made to the witness was that he "was incompetent to testify *because of his youth and ignorance.*" It is not objected that he did not "understand the obligation of an oath." If that had been the objection it might, and perhaps could, have been obviated then and there by a further examination—and, if necessary, by instructions given the witness under direction of the court. (Taylor v. The State, 22 Texas Ct. App., 529; Holst v. The State, 23 Texas Ct. App., 1; Comm. v. Lyons, 9 Crim. Law Mag., Mass., 68.)

The objections urged are solely as to his "*youth and ignorance.*" "There is no precise age under which a child is deemed incompetent to testify, but when under fourteen years of age, competency is determinable by an examination, and the action of the court thereon will not be revised in the absence of a showing that its discretion was abused, and unless an abuse of discretion is apparent." (Willson's Crim. Stats., sec. 2435.)

Objection, therefore, simply upon the ground of "youth" was no objection. As to the objection under the ground of "ignorance," suffice it to say that this witness's testimony, as detailed in the statement of facts, is as clear, circumstantial, positive and intelligent as most witnesses of mature years and

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good, ordinary education could give concerning the same facts and circumstances, and, more than that, his testimony throughout is corroborated by the physical facts discovered and detailed by other witnesses in the strongest possible manner. No error is perceived in the court's overruling the objections to his testimony upon the grounds of "youth and ignorance."

2. For the purpose of impeaching the testimony given by the wife of deceased at the trial the prosecution was allowed, over objection of defendant, to prove contradictory statements made by her to officers who had her under arrest as one of the parties implicated in the murder, whilst they were conveying her to jail the day after it occurred. The objections to the testimony urged by defendant were that she was under arrest or in duress at the time, and that her declarations were hearsay. Prior to the trial of this defendant she had herself been tried and acquitted. The objection that the witness was under arrest at the time she made the contradictory statements was not available by this defendant. It is the confession or admission of *a defendant who is on trial*, made when *he* is under arrest, which can not be used against him except under the circumstances and upon the conditions mentioned in the statute. (Code Crim. Proc., arts. 749, 750.) This statute does not apply nor extend to parties not defendants on trial. As to the declarations being hearsay, whilst that was true in so far as this defendant was concerned, they were nevertheless admissible to impeach the witness, and that was the sole purpose of their admission, as the jury were very properly and explicitly told by an instruction given them upon the subject by the learned trial judge. They were expressly limited and restricted in its consideration to the only purposes for which the evidence was admitted, and they could not have been misled as to the objects and purposes of its admission.

3. On defendant's motion for a new trial he assailed one of the jurors who tried the case for bias and prejudice against him as shown by statements of the juror made before he was placed upon the panel. This matter, in our opinion, is satisfactorily explained and settled against the objections urged to the juror, by the counter affidavit of the juror himself.

4. Some objections are raised to the charge of the court to the jury, but we have found it to be a clear, comprehensive and fair presentation of the law to the various phases of the case.

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Statement of the case.

As to the evidence, though it is circumstantial, it is to our minds as cogent and convincing as such a case could well be. That the defendant is the guilty agent who assassinated the deceased in his own house whilst at his meals and unconscious of danger, and that he did so from revenge and jealousy, we have no doubt. After a fair and impartial trial he has had the extreme penalty of the law denounced against him, and because we have been unable to find in this record, which he has submitted to us on his appeal, any good or sufficient reason why his conviction should be set aside, the judgment is in all things affirmed.

Affirmed.

Opinion delivered February 27, 1889.

No. 2679.

E. G. MOODY v. THE STATE.

MURDER—EVIDENCE—FACT CASE.—See the statement of the case for evidence objected to by a defendant on trial for murder, *held*, in view of the other proof in the case, to have been properly admitted; and note that the evidence as a whole is held amply sufficient to support a conviction for murder in the second degree.

APPEAL from the District Court of Falls, on change of venue from the District Court of Limestone. Tried below before the Hon. Eugene Williams.

The indictment in this case charged the appellant and Mitch Sanders, as principals, with the murder of Sam Scott, in Limestone county, Texas, on the thirteenth day of March, 1885, and likewise impleaded John P. Bagwell and Joe Bowers as accomplices to the same murder. The venue as to the appellant and Sanders was, upon their motion, changed to Falls county, in the district court of which county the appellant, being alone upon trial, was found guilty of murder in the second degree, his punishment being assessed at a term of five years in the penitentiary.

J. W. Towers was the first witness for the State. He testified that in March, 1885, he lived in the town of Thornton, in Limestone county, Texas, at which time he followed the occu-

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pation of a retail hardware dealer. About nine o'clock on the morning of March 13, 1885, two parties, then strangers to him, but who he afterward saw and recognized in the Groesbeck jail as John P. Bagwell and Mitch Sanders, came into the witness's store in Thornton, and Sanders purchased from him a box of thirty-eight calibre center fire pistol cartridges. The box which contained said cartridges was made of paper, and the witness's private cost mark was endorsed on the same. The witness could not now remember that cost mark. Two or three days after the said sale to Sanders, the witness saw the said box, or one exactly like it, bearing his private cost mark, in the grand jury room in Groesbeck, Texas. A small part of the box was then gone, and appeared to have been torn off. The witness observed the said parties when they left Thornton. They went south over the Kosse road toward Kosse. They had three horses with them, and were riding two and leading one of them. The witness did not remember the description of the said horses. They also had a new black leather saddle, which they purchased that day from Mr. J. C. Spencer. The witness had no regular customers residing beyond Kosse on the Kosse and Franklin road, and had no recollection of ever selling cartridges to any other person who lived beyond Kosse.

Cross examined, the witness said that he had transient customers at that time, and had frequently sold such cartridges as he sold to Sanders in similar boxes, bearing the same cost mark. While witness could not swear positively that the cartridge box he saw in the grand jury room was the box he sold Sanders, it was, in every respect, the same kind of a box.

J. C. Spencer testified, for the State, that he kept a harness and saddle shop in Thornton, in March, 1885. On the thirteenth day of that month, in the forenoon, he sold a stationary covered red leather saddle to two young men whom he did not know at the time. A day or two after the murder of Sam Scott and Savannah Brown the witness saw and identified the said two young men in the Groesbeck jail, and then learned their names to be John P. Bagwell and Mitch Sanders. Bagwell and Sanders had three horses with them in Thornton—riding two and leading one. When they left they went south toward Kosse, which was eight miles distant from Thornton.

George Herrod testified, for the State, that he kept a retail liquor saloon in Thornton on the thirteenth day of March, 1885, and on the morning of that day had a call from two young

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men for a quart of whisky. He put the whisky in two pale green whisky bottles or flasks. He remembered the flasks distinctly, because he had to open a fresh box to get them, and when he took them out he saw for the first time that he had whisky flasks of that description. The sale of the whisky to the said parties was particularly impressed upon the mind of the witness by the fact that the older of the two handed the witness a twenty dollar greenback bill from which to take his pay. Being unable to change the bill, he took it to every merchant in town, but could get no smaller change than two ten dollar bills. He then returned to his saloon and reported to the young men that he could not get the bill changed. The young man then turned to his companion and borrowed a dollar from him, with which he paid the witness for the whisky. Witness afterward identified those two young men in the Groesbeck jail, and learned that their names were John P. Bagwell and Mitch Sanders. Bagwell was the man who bought the whisky and offered the twenty dollar bill in payment, and Sanders was the man who loaned him the dollar with which he finally paid for the whisky. Witness did not see the horses ridden or led by Bagwell and Sanders, nor did he see those parties when they left Thornton. The witness was afterward before the grand jury in Groesbeck. He had a faint recollection of seeing a pale green whisky flask in the grand jury room, but was not certain that he did. The witness had no regular customers who lived below Kosse on the Kosse and Franklin road.

Cross examined, the witness said that he sold a great deal of whisky in flasks to transient customers—cow boys and others, —in March, 1885. While he could not now recall any other particular transaction, he thought he could safely say that he sold to other parties than Bagwell and Sanders, on the same day, whisky put up in flasks of the same kind, taken from the same case. Witness bought the said flasks from Ullman, Lewis & Co., of Galveston. There were other retail liquor dealers in Thornton who, as witness supposed, bought flasks from Ullman, Lewis & Co., and it was quite probable some of them had similar pale green flasks in stock on the said March 13, 1885, and it was quite possible that some of those retail dealers had customers living beyond Kosse on the Franklin road.

John Grissum testified, for the State, that he was in Herrod's saloon throughout the transaction detailed by Herrod, and corroborated Herrod's statement in every particular.

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Statement of the case.

Cab. Hood testified, for the State, that he lived in the town of Kosse in March, 1885, and was then engaged in the livery stable business. On the thirteenth day of that month he was hired by a drummer to take him to Thornton in a buggy. At about eleven o'clock a. m., the witness and the drummer met two men, each riding a bay horse, and one of them leading a bay horse somewhat larger than either of the other two. It was the recollection of the witness that the led horse had a saddle on, but the witness was now unable to say whether it was a new or an old saddle. Each of those men was dressed as cow boys, wearing broad brimmed stockmen hats. Each had a slicker tied behind his saddle, and one of them wore a ducking round-about jacket. The witness afterwards saw John P. Bagwell and Mitch Sanders in the Groesbeck jail, and recognized them as the men he met on the road between Kosse and Thornton, on the said thirteenth day of March, 1885.

Alex Graves testified, for the State, that he was a blacksmith by trade, and, in March, 1885, lived in Kosse, where he kept a shop. His said shop was situated on the east side of the railroad, about one hundred yards east of Autry's barber shop. About noon on the thirteenth day of March, 1885, just as the witness was closing his shop to go to dinner, two young men, then strangers to witness, but whom he has since known as John P. Bagwell and Mitch Sanders, came to his shop, each riding a bay horse, and one of them leading a somewhat larger bay horse that had a white spot on the belly, about the girth. One of them inquired if witness was closing up. Witness replied that he was, and asked if they wanted any work done. They replied that they wanted their horses shod, but would wait until witness got back from dinner. They then dismounted, and hitched their horses at the shop, and witness went to his dinner. Witness returned to his shop about one or half-past one o'clock, and, after working an hour or more, the parties not having returned, went up town to hunt for them. At Autry's barber shop he found the two strangers in company with the defendant and Joe Bowers, both of whom he knew. Autry had just finished shaving the defendant when witness reached the shop. Witness asked the strangers if they wanted their horses shod. The younger man of the two,—Sanders,—stepped to the door, looked at the sun and replied that it was then too late, as they had to reach the neighborhood of Franklin by night, but that they would return on Tuesday, when they would get witness to

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Statement of the case.

shoe their horses. About that time the defendant asked the strangers if they were ready to go. They replied that they were, and defendant and Bowers said that they would go down town, get their horses and meet the said parties at witness's shop. Witness went back to his shop with Bagwell and Sanders, who got on their horses. They were soon joined by the defendant and Bowers on horseback, and the four then left witness's shop, going towards Franklin over the Kosse and Franklin road. In traveling that road to Franklin the parties would necessarily pass the houses of George Lewis, Pitts, Welch, Wadsworth and Samuels. None of the parties called each other by name in the hearing of the witness, and witness did not know whether Bagwell and Sanders were personally known to defendant and Bowers. On the Sunday following the murder of Sam Scott and Savannah Brown, the witness saw the white bellied bay horse in constable Early's lot. The said four parties left Kosse about three o'clock in the evening, traveling in a fast walk or fox trot,—a gait that would take them four and a half or five miles an hour.

Henry Autry testified, for the State, that he kept a barber shop in Kosse in March, 1885. The witness closed his shop about twelve o'clock, noon, on the thirteenth day of that month and went home to dinner. Returning about one or half past one o'clock, he found two strangers sitting on a bench in front of the shop, waiting for him. Witness opened his shop, cut the hair, shaved, shampooed and dyed the mustache of the elder of the two men, whom he afterwards identified in the Groesbeck jail as the man called John P. Bagwell. He shaved the other man, whom he afterwards saw in the Groesbeck jail under the name of Mitch Sanders. While Sanders was being shaved, the defendant and Joe Bowers came into the shop and met the other two men, Bagwell and Sanders, like old and intimate acquaintances. They shook hands "all round" and entered into familiar and friendly conversation with each other. After shaving Sanders, the witness shaved defendant, and the four parties then agreed to leave town together. Either defendant or Bowers asked Bagwell and Sanders where their horses were. They answered that their horses were tied at the blacksmith shop across the railroad. Defendant and Bowers then said they would go down town, get their horses and join Bagwell and Sanders at the blacksmith shop. A few minutes later the witness saw the two parties, whom he took to be de-

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fendant and Bowers, ride across the railroad towards Graves's blacksmith shop. The witness did not recollect that Alex Graves came to the barber shop while the several parties were there, and asked Bagwell and Sanders if they wanted their horses shod. The said four parties were dressed in ordinary citizens clothes. Witness did not remember what kind of hats they wore, and if either of them was armed the witness did not know it.

The testimony of the witnesses Towers, Spencer, Herrod, Autry and Graves, as above set out, is the testimony referred to in the head note as that objected to by the defendant on the trial. The objection urged to the testimony of the first three was that it related to the acts of Bagwell and Sanders before they are shown to have had any connection with the defendant, and that their testimony about the articles purchased by Bagwell and Sanders, and afterwards seen by the witnesses in the grand jury room, did not connect the defendants in any manner with the said articles. The objection urged to the testimony of Graves and Autry was that they should not have been permitted to express, inferentially or otherwise, any opinion as to whether or not defendant was acquainted with Bagwell and Sanders prior to meeting them in the barber shop.

Martha Brown testified, for the State, that she was the mother of Savannah Brown, and the mother-in-law of Sam Scott, the parties for the murder of whom the defendant was now on trial. The witness lived about two and a half miles east of the town of Kosse, and about a quarter of a mile north of Mrs. Martha Brooch's place. Witness's daughter Savannah lived with her until the day of her death. Sam Scott, at the time of his death, lived on Mr. Cole Roebuck's place. Mr. George Lewis and his wife lived about a mile and a quarter from Kosse on the Kosse and Franklin road. The witness spent the fatal day—March 13, 1885—at the house of the said Mr. Lewis, scouring. A few minutes after the clock struck three on that evening, Mrs. Lewis called the witness's attention to four men riding past the house on the Kosse and Franklin road, going towards Franklin. Mrs. Lewis then asked witness if she knew the men, to which inquiry the witness replied that she did not. The men were all riding separate horses, and one of them was leading an extra horse. The horses were all nearly of a color, being bays or sorrels. The witness paid no attention to the dress of any of the men. They were riding in a fast walk or

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fox trot, and were laughing and talking as they passed the house.

The witness left her daughter Savannah at home on that morning. She was expecting Sam Scott to come to the house during that day, bringing witness's younger daughter, Mary, with him, the said Mary having been at Sam's house attending his wife who, about a week before, gave birth to a child. Savannah was to return with Sam and spend a week attending her sister. Sam and Savannah were to take with them a lot of baby clothing and a quilt, which said articles the witness, before leaving home on that morning, arranged in a tow sack. The quilt was placed at the bottom of the sack for the purpose of closing a torn place in it. The baby clothes were tied in a sheet and placed in the sack, above the quilt. About one o'clock, p. m. witness's daughter Mary came to Mrs. Lewis's and asked witness if Savannah was to go home with Sam. Witness replied that she was, and directed Mary to return and tell Sam and Savannah to start at once. Witness got home about sunset and found that Savannah had left to go home with Sam Scott. About ten o'clock on the next morning a man came to witness's house and reported the discovery of the dead bodies of Sam Scott and Savannah, near the Persimmon pond, on the Kosse and Franklin road. Witness repaired at once to the point indicated. She found the body of Sam Scott lying on the right hand side of the road. There was a large bullet hole in his right side, and a smaller one in his head. The absence of blood about the wound in the head indicated that it was inflicted after death. From Scott's dead body Savannah was tracked in a circle, first south, then west, then north to a point, under a black jack tree, across the road, about one hundred yards distant from the said road. and about the same distance from Scott's body, where her dead body was found. There was a bullet hole through her head, entering about the center of her forehead. There was also a flesh wound on the right arm, which had bled profusely over her clothes on that side. The forehead about the wound was powder burned, and the wound contained many fragments or crumbs of tobacco. A roll of home cured leaf tobacco was grasped in one of the hands of the girl, and it was evident that she must have had her hand before her face when shot, and that the ball passed through the roll of tobacco before entering her forehead. The leaves and ground where her head was resting were covered

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with blood and brains. The back part of the skull was shattered and reduced almost to jelly.

The track of the girl was followed from the dead body of Scott to the point where her body was found, and tobacco crumbs were scattered throughout the length of the trail between the bodies. The tracks showed the girl to have been running when shot down. The tracks of a horse followed the tracks of the girl throughout her flight. The tracks at one place showed the girl to have run into a tree top, in which tree top her bonnet was found. The horse tracks at that point showed the horse to have been suddenly checked. At another point on the trail the tracks showed the horse to have passed the girl, who evidently got behind a tree to avoid her pursuer; and the broken bark on that tree showed the horse to have run against it or to have struck it with his feet. At a point on the trail about fifteen steps from Scott's body a spot of blood was found which most probably had fallen from the girl's wounded arm, and from that point to the girl's body her flight over the trail was marked by blood spots as well as foot tracks. Witness had the bodies removed to her house, whence they were buried on that evening. Sam Scott's bench legged fice dog was lying by the side of Sam's body and protested savagely against interference with his dead owner. The bed quilt was partly in the sack on the road side, and the clothes which had been done up in a bundle were scattered along the road for some distance. Savannah's underclothing, when the body was found, was wadded and stuffed between her legs, and her dress was pulled smoothly down.

Cross examined, the witness stated that a large number of people were on the ground, and had hunted over it, when she reached the dead bodies. Savannah was about fourteen years old, and was having her menstrual flow for the third time when killed. Witness could not say that she discovered about the body of her daughter any indications of rape or attempted rape. Sam Scott was about thirty years old. The dead bodies were found on the Kosse and Franklin road, about two miles from the point where that road was intersected by the road which led to the witness's house via Mrs. Brooch's place, which place was about a mile and a quarter from the said point of intersection. It was the track of an unshod horse that followed the flight of the girl from the dead body of Scott to the point where she fell.

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Statement of the case.

R. E. Pitts testified, for the State, that in March, 1885, he lived about a quarter of a mile from Kosse, on the Kosse and Franklin road, his field being immediately across the said road from his house. He was plowing in his said field on the evening of March 13, 1885. About four o'clock on the said evening he observed the approach over the said road from the direction of Kosse of four men riding bay or sorrel horses, and one of them leading a bay horse. They wore cowboy hats, were otherwise dressed like cowboys, and witness took them to be cowboys. The fact that those parties appeared to be intoxicated arrested witness's particular attention, and he stopped his plow about seventy-five yards from the said fence and observed them until they passed. It was about ten o'clock on the next morning when the witness heard of the finding of the dead bodies of Sam Scott and Savannah Brown, near the Persimmon pond. He went to the place where the bodies were found as soon as he got the news. The bodies had been taken up and were in a wagon when he reached the place of the tragedy. He did not get out of his conveyance when he reached the fatal place, and saw nothing picked up from the ground, either at that place or along the road. He noticed a tree just across the Lowery branch from Jim Wadsworth's house, which had been recently shot into, but he did not leave his conveyance to examine it. On the Sunday following the fatal Friday, the witness was in Kosse and saw the defendant and another person. Defendant and the said other party suited the general description of two of the four parties who passed the witness's house, as stated, on the fatal Friday. The horses they then had looked like two of the horses ridden past the witness's house by two of the four parties mentioned on the said Friday.

On his cross examination, this witness stated that "any other two men of anywhere in the neighborhood of the size of Moody and the man I saw under arrest riding bay ponies, would have suited my idea of the men who passed on Friday (as well) as Moody and the other man did." The witness plowed in his field until late in the evening on the fatal Friday, but saw no other crowd of four men pass along the road. The rows plowed by the witness ran to and from the road, and not parallel to it, and consequently the witness's back was toward the road about half of the time, and it was possible, perhaps, that other parties may have passed while he was plowing from the road, without being seen by him. That, however, was not

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probable, as the patch he was plowing was a small one, enclosing not more than three or four acres. The spring "round ups" were about commencing in March, 1885, when the party of four men passed the witness's place on the fatal Friday, and a great many cowboys about that time of the year passed over that road going to the cattle ranges. The point where the dead bodies of Sam Scott and Savannah Brown were found was in Limestone county, on the Kosse and Franklin road, about midway between the five and six mile posts out from Kosse.

Willie Welch testified, for the State, that, on the thirteenth day of March, 1885, he was living at his father's house, on the Kosse and Franklin road, about two miles from Kosse. He was planting corn in his father's seventy-five acre field on the evening of that day. A party of four men, riding bay or sorrel horses, and one of them leading another horse, passed witness's father's said field, on the said road, going toward Franklin about mid afternoon on the said day. As they passed along that part of the road, about opposite where the witness was at work, they were hallooing, and one of them was firing off a pistol. He fired four or five shots. The witness heard other shots fired further down the road, about or nearly opposite Wadsworth's house. On the next morning the witness heard of the finding of the dead bodies of Sam Scott and Savannah Brown, and he and his father and Church Samuels went to the point in the road opposite the corn field, where the witness saw the shots fired on the evening before, and from the ground about that point Mr. Samuels picked up four or five thirty-eight calibre, center fire pistol cartridge shells. The witness plowed near the said road during the entire evening of March 13, and saw no other crowd of men pass than the one described.

Cross examined, the witness stated that, so far as he knew, but one of the said four men had a pistol. The bodies of Sam Scott and Savannah Brown were found about five and a half miles from Kosse on the Kosse and Franklin public road. It is about half a mile from Kosse to Pitts's house; about two miles from Kosse to the point in the field where the witness was plowing on the said Friday evening; about three miles from Kosse to Wadsworth's house; about four miles from Kosse to the intersection of the Kosse and Franklin road with the road that led to Martha Brown's house, via Mrs. Brooch's house, which last mentioned house was about a mile from the said

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point of intersection, and about two and a half miles from the point on the Kosse and Franklin road where the dead bodies were found. A person going from Mrs. Brooch's place to the Cole Roebuck place would travel the Brown-Brooch neighborhood road to its intersection with the Kosse and Franklin road, and then the Kosse-Franklin road toward Franklin to the point beyond the six mile post from Kosse, where the neighborhood road leading to Roebuck's place left it.

James Wadsworth testified, for the State, that he lived on the Kosse-Franklin road, about three miles southeast from Kosse. On the evening of March 13, 1885, the witness was plowing in his field about one hundred and fifty yards from the said road. About an hour and a half or two hours before sunset on that evening four men, dressed like cow boys, all riding bay or sorrel horses, and one leading an extra horse, passed along the said road going from the direction of Kosse towards Franklin. All the said parties appeared to be drunk, and the witness, expecting them to stop for water at the well at his house, unhitched his team and started to the house. The parties, however, did not stop, and witness went back to his work. A few minutes after the said parties passed, the witness heard four or five pistol shots fired down the road in the direction they went, and at about the point where, on the next morning, he observed a tree that had been recently shot into. On the next morning after seeing those men the witness heard of the discovery of the dead bodies of Sam Scott and Savannah Brown, near the Persimmon pond, and was summoned by constable Early to serve on the coroner's jury to view the bodies. Witness reached the bodies between ten and eleven o'clock on that morning—too late to serve on the inquest. The bodies lay about one hundred yards apart, midway between the five and six miles posts, out from Kosse. Scott's body lay on the side of the road. A large ball had entered his right side, passed through the body, and lodged under the skin on the opposite side. A smaller ball had entered his head at the corner of one eye. He had evidently been shot dead in his tracks, there being no indication on the ground that he took a step after receiving the first of the shots. The girl's tracks showed that she fled in a semicircle from Scott's body across the road, to the left hand side of the said road, about fifty yards from the road, and a hundred from Scott's body, where she fell, and where her body was found. One of her hands clasped a roll of home

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cured leaf tobacco. A bullet had entered her head at the center of the forehead; which wound contained tobacco crumbs, the skin around it being powder burned. There was also a flesh wound on one of her arms. Tobacco crumbs were found along the trail passed over by the girl in her flight, and her bonnet was found in a tree top where she had evidently sought refuge from a pursurer. The track of an unshod horse followed the track of the girl throughout the distance between the two bodies. That track showed that the horse was suddenly checked at the tree top, and that at another point his feet struck the trunk of a tree behind which the fleeing girl sought shelter. The two wounds in the body of the girl and the wound in Scott's head were made by the same sized balls, while that in Scott's body was made by a larger ball. At or near the bodies one loaded cartridge and four exploded cartridge shells were found. One of the four shells was that of a forty-five calibre Colt's improved pistol cartridge, and was of the size of the bullet hole in Scott's side. The others were thirty-eight calibre Smith & Wesson pistol cartridge shells, and were of the size of the wounds on the girl's body and on Scott's head. A sack, some clothes and an old quilt were found lying near Scott's body. The clothes and quilt seemed to have been pulled out of the sack. A bench legged fice dog was squatted near Scott's body. Just after crossing Lowery's branch, en route to the dead bodies, the witness and the parties with him saw a tree into the trunk of which several bullets had been recently fired, and at the root of that tree they picked up a part of a paper thirty-eight calibre center-fire cartridge box, and the hull of a forty-five calibre center-fire cartridge, and in the road opposite the tree they found four or five empty thirty-eight calibre center-fire cartridge hulls. The cartridge box had evidently been torn open at that place and the cartridges taken out. Near this same tree an empty pale green pint whisky flask was found; all of which said articles the witness turned over to justice of the peace Hodges, and he afterwards saw them in the grand jury room at Groesbeck.

Cross examined, the witness said that he would not undertake to swear that no other crowd of four men than that referred to by him passed his house on the said Friday evening. There was a great deal of blood about the body of the dead girl, who wore pads, such as women generally wear during their menstrual flows; the said pads being in proper position.

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Statement of the case.

Witness saw no indication of rape or attempted rape. The witness saw a horse track leading from Sam Scott's body up a hog trail to the girl's body, near which body it appeared to join the horse which followed the girl in her flight. From that point the two said horses went together over the trail to the road. Neither of said horses was shod. The four men who passed witness's house on the fatal evening were dressed like cow boys, wore cow boy hats, and each had a slicker tied to his saddle. There was no saddle on the led horse.

Pres Brooch testified, for the State, that he lived with his mother two and a half miles east of Kosse, in March, 1885. He was plowing in the field on the evening of the thirteenth day of said month. The witness went from the field to the house, about four o'clock on that evening, to get a drink of water. While at the house he saw Sam Scott and Savannah Brown, whom he knew well, pass the house, traveling the road known as the Brooch road, going towards the Kosse and Franklin road. Scott, followed by his bench legged dog, had on his head a bundle of clothes done up in a bed quilt, and Savannah had a roll of home cured leaf tobacco in her hand. They were walking leisurely at a gait of two and a half or three miles an hour. The witness remained at the house between ten and fifteen minutes, and when he started back to his work he called to his mother in the house to look at the clock and tell him the time. She replied that it was just four o'clock. Witness went back to his work, and had plowed about fifteen or twenty minutes when loud talking and a pistol shot fired on the Kosse-Franklin road attracted his attention. Looking in that direction he saw four men corresponding in description with those mentioned by previous witnesses. The said men were riding along the road talking loudly, laughing boisterously, and at least one of them was discharging a pistol. They appeared to be drunk. The witness could not see their horses, and only the bodies and heads of the men. Those men were traveling at a gait of four and a half or five miles an hour, and when seen by the witness they were on the Kosse-Franklin road, about a mile and a quarter from its intersection with the Brooch road, which intersection was about two miles from the point where the dead bodies of Scott and Savannah Brown were afterwards found.

Church Samuels testified, for the State, that in March, 1885, he lived on the John Welch place, on the Kosse-Franklin road,

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about two miles from Kosse. He stated that he was in the field at work with Willie Welch on the evening of March 13, 1885, and he corroborated in detail the testimony of Willie Welch, adding that he took the cartridge hulls (picked up by him at the point on the road where he saw one of the parties shooting) before the grand jury and turned them over to the foreman of the same. He then testified that he reached the dead bodies on the next morning before they were removed from where found, and he corroborated in detail the narrative of the witness Wadsworth as to everything appearing on the ground, the character of the wounds on the bodies, the finding of the cartridge hulls, cartridge box and the pale green whisky flask.

On his cross examination he stated that he thought, but was not certain, that one of the four parties who passed Welch's house, on the evening of March 13, had a gray horse.

Mrs. Martha Brooch, for the State, corroborated the testimony of her son Pres., except that she stated nothing about seeing four men on the Kosse-Franklin road soon after Sam Scott and Savannah Brown passed her house.

Justice of the Peace M. P. Hodges testified, for the State, that he reached the scene of the tragedy just after the dead bodies had been placed in a wagon for removal. He did not examine the bodies critically himself, nor did he examine the ground at all. He saw the tree across Lowery's branch into the trunk of which several pistol balls had been recently fired. Somebody handed to the witness some cartridge hulls, the larger part of an empty paper cartridge box, and a pale green pint whisky flask; which articles the witness subsequently delivered to the grand jury. The cartridge hulls were of two sizes—thirty-eight and forty-five calibre—and, on a test in the grand jury room, they fitted respectively the two pistols which the witness saw in that room.

A. W. Proctor testified, for the State, that he was the foreman of the grand jury of Limestone county at the March term, 1885, which grand jury investigated the murder of Sam Scott and Savannah Brown, and presented this and other indictments. They had several witnesses before them on this case, and also certain cartridge hulls, the larger part of a paper cartridge box, and a pale green pint whisky flask; which were delivered to witness by Esquire Hodges. The cartridge hulls were of two sizes—thirty-eight and forty-five calibre. They also had two pistols before them, both of which were obtained

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from Deputy Sheriff John Kimball, who reported that he took one—a forty-five calibre centre-fire improved Colt's revolver—from John P. Bagwell, and the other—a thirty-eight calibre centre-fire Smith & Wesson revolver—from Mitch Sanders. The thirty eight calibre cartridge hulls fitted the Sanders pistol, and the forty-five calibre, the Bagwell pistol. Mr. Towers was before the grand jury, and identified his private cost mark on the cartridge box.

Deputy Sheriff John Kimball testified, for the State, that he heard of the murder of Sam Scott and Savannah Brown on the morning of March 14, 1885, and started out immediately in quest of the murderers. He arrested defendant and Joe Bowers on Sunday, March 15, 1885, and Bagwell and Sanders on the following Tuesday or Wednesday. The witness arrested Bagwell at the house of Charley Moody, some eight miles east of Groesbeck, about ten o'clock in the morning, just after his return from a deer hunt. Bagwell's pistol was hanging up in Charles Moody's house, over a door. It was a forty-five calibre, center-fire improved Colt's revolver. It had been recently well cleaned and thoroughly oiled, and was not loaded. Witness arrested Sanders about nine o'clock on the night of the same day at the house of his aunt, Mrs. Bates, about fourteen miles east of Groesbeck. Sanders, when arrested, had in his possession a thirty-eight calibre, center fire Smith & Wesson six shooter pistol. The witness delivered the said pistols to the grand jury then in session at Groesbeck, and while in the grand jury room he saw same cartridge hulls inserted into the cylinder of each pistol, which they fitted perfectly. Bagwell, after his arrest, rode to Groesbeck on a large bay horse branded L4 on the shoulder. One of the feet of that horse had been cut on a wire. Sanders rode to town on a small, young black pony. From the places where witness arrested Bagwell and Sanders, to the Tom Bates place where the defendant lived, the distance was about twenty miles. The witness knew a certain forty-five calibre Colt's pistol that once belonged to Mr. Anglin, and which Major B. M. Burrows afterwards owned. The defendant and Charley Moody were not related to each other.

Charley Moody testified, for the State, that in March, 1885, he lived in Limestone county about eight miles east of Groesbeck, and about thirty miles distant from the T. J. Bates place, where defendant was said to have lived. He did not know the defendant, and was not related to him. He knew John P. Bag-

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well, whose acquaintance he formed in Erath county. Deputy Sheriff John Kimball arrested Bagwell, for the murder of Sam Scott and Savannah Brown, at the witness's house in Limestone county, about March 18, 1885. Bagwell came to witness's house about eleven o'clock on the day preceding his arrest, hunting work. Witness had no work to be done and did not hire him. He brought to witness's house a forty-five calibre, center fire Colt's six-shooter, and was riding a bay horse about fifteen hands high. The horse was branded, but witness did not remember the brand, nor did he remember that the horse had a foot cut by wire. Bagwell fired his pistol off, oiled and hung it up over the door on the morning of his arrest. He was arrested immediately after he and witness got back from a deer hunt.

Harriet Scott testified, for the State, that she was the widow of Sam Scott, and the sister of Savannah Brown. She lived, on March 13, 1885, with her husband on Mr. Cole Roebuck's place. She was sick on Friday, March 13, 1885, having about a week before that date given birth to a child. On the morning of the said Friday her husband and her sister Mary, who had been attending her since her confinement, left home to go to the house of Martha Brown, witness's mother, which house was near Mrs. Brooch's place. Sam was to return home that night, bringing witness's sister Savannah with him. Witness had never seen her husband nor her sister Savannah since. She heard on the next day that their dead bodies had been found on the Kosse-Franklin road near the Persimmon pond. The witness knew the defendant. He lived in 1885, until his arrest, on the T. J. Bates place. Defendant knew Sam Scott. Some time in 1885, prior to the killing of Scott, a party of men passed Sam Scott's house. Sam Scott's fice dog ran at and barked at them, when one of the party shot at the dog. A voice, which the witness took to be the voice of the defendant, exclaimed: "Shoot him again!" Sam Scott was in his yard at that time. The witness had seen the defendant at Jim Sapp's house on that day. To go from Sapp's house to where the defendant lived a person would necessarily pass Sam Scott's house. The witness told Mr. Roebuck about the dog being shot at, and told the same thing to Mr. T. J. Bates about a month before this trial, and soon afterwards she was attached as a witness in this case. She had never before testified on the trials of this defendant nor on the trial of Sanders.

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Cole Roebuck testified, for the State, that he lived in Robertson county, about a mile and a half from the point in Limestone county where the dead bodies of Sam Scott and Savannah Brown were found. Sam Scott, at the time of his death, was a tenant of the witness and lived on his place. Mr. John Roy, who with his brother, en route to Kosse, on the morning of March 14, 1885, discovered the dead bodies, informed the witness of the discovery, and witness went to the bodies, arriving there before any other persons than the Roys did. This witness's narrative and that of James Wadsworth (except that part of Wadsworth's which related to the men who passed his house on the evening of the thirteenth) is substantially the same and need not be repeated. He stated in addition that the defendant, to his knowledge, knew Sam Scott. Witness heard about Sam Scott's dog being shot at, near Sam's house, in the preceding fall, as testified by Harriet Scott.

T. J. Bates testified, for the State, that, on March 13, 1885, the defendant lived on his place, about four miles distant from the place where the dead bodies of Sam Scott and Savannah Brown were found. On the said March 13 the defendant had in his possession a certain forty-four calibre, center fire Colt's pistol, which belonged to the witness—a present to him from Major B. M. Burrows, of Groesbeck. He borrowed that pistol from witness two or three months before for the purpose, as he said, of killing hogs. The witness reached the dead bodies between nine and ten o'clock on the morning of March 14. From this point his narrative with respect to the bodies, tracks, discoveries, etc., is substantially the same as that of the witnesses Wadsworth and Roebuck. Continuing his testimony, he stated that he went to the defendant's house on the evening of the said March 14, 1885, and got his said pistol. Joe Bowers, who was at the defendant's house, gave the pistol to witness. It was then unloaded, clean and in good order. Subsequent to the arrest of defendant and Bowers, the witness was shown two horses which were pointed out to him as the horses ridden to Kosse by the defendant and Bowers after their arrest. The witness up to that time had known defendant's horse stock, but had never known him to own those two horses, nor a strange horse that was then in his, defendant's, lot. He afterward saw the horses on which Bagwell and Sanders were brought to town, and knew that, a short time before, those horses belonged to the defendant. According to this witness,

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the track of the horse which followed the flight of Savannah Brown over the trail showed that horse to be unshod, but the track of the other horse which went from the body of Scott over the hog path to the body of Savannah Brown, showed that horse to be shod in front, but not behind.

On cross examination, this witness said that he critically examined his pistol after getting it from Bowers on the evening after the murder, but he could find no indication of it having been recently discharged. It was unloaded when witness got it back. The witness denied that on all the previous trials of this case he testified that the pistol was loaded when he got it back, and that the heads of the cartridges where they came in contract with the metal had cankered, showing that the said cartrides had been in the pistol for a long time. Although the witness knew little about the calibre of pistols, he was certain that his said pistol was a forty-four calibre. He denied that he had ever conversed with Harriet Scott about this case.

N. B. Hamilton testified, for the State, that in March, 1885, he lived about two miles from defendant's residence. The defendant spent several hours at the witness's house early in December, 1884, and during a conversation with witness asked him: "What kind of a nigger is that who lives on Cole Roebuck's place?" Witness asked him if he meant Sam Scott. He replied that he did, and witness replied: "He is a very good sort of a nigger, so far as I know. Why do you ask?" He replied: "Oh, I don't know. I hear that he calls Mrs. Roebuck 'Aunt Sue,' and the wives of John Stuart and Jim Sapp 'Sook' and 'Sal.' Before I live in this country six months I will throw him off his feet." Defendant had just prior to that time moved into that neighborhood. Witness did not know whether defendant was acquainted with Bagwell or Sanders prior to March 13, 1885.

Cross examined, the witness stated that no person but he and defendant were present at the conversation about Sam Scott, above detailed. Witness attached no importance to defendant's said threat against Scott. Defendant's wife, Mrs. Maggie Moody, who was the sister of John Stuart, died during the January preceding this trial. The witness denied that after the defendant's arrest, and while his wife and child were at home alone, he went to defendant's house, cursed and swore boisterously, and discharged a pistol in the house, and in the yard in front of the house. He admitted that he went to that

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house the night of the day on which Mrs. Moody gave a cotton picking, thinking there was to be a dance, and he insisted that she should give a dance, but he did not curse and swear, and discharge his pistol on that occasion. The witness was a nephew of T. J. Bates.

Constable W. D. Early testified, for the State, that he heard of the killing of Scott and Savannah Brown, about nine o'clock on the morning of March 14, 1885, and at once summoned a jury of inquest and went to the bodies. With respect to the bodies, tracks, etc., this witness testified substantially as did the witnesses Wadsworth and Roebuck. At the conclusion of the inquest a warrant for the arrest of four unknown parties was placed in witness's hands, and he and Doctor Manuel started out in quest of said parties. At Bates's gate witness and Manuel met the defendant and Joe Bowers. Defendant said that he had heard of the discovery of the bodies of two dead negroes, down the road, and that he and Bowers were going to see them. Witness told him that the bodies had already been taken to Kosse. Doctor Manuel then said that he could go no further with witness, and advised witness to take defendant to help him in his search for the four unknown parties. Defendant consented to go, and told Bowers to go back to the house and finish up the work. Defendant did not know who witness was hunting. Witness asked him if he did not pass over the Kosse-Franklin road on the previous evening. He replied readily that he did, in company with Bowers and two other young men whose names he did not remember, except that one of them, with whom he traded for the horses he and Bowers were then riding, had a name that sounded something like Howell. He further stated that those two young men left his house on the previous evening, saying that they were going to Headville. The witness and defendant then went to the house of a deputy sheriff in Robertson county to get him to help hunt the murderers. Not finding the deputy the witness, telling defendant to go home and to be ready to accompany him on the search the next day, went to the house of a friend and spent the night. On the next morning witness got the deputy sheriff he looked for the night before, went to the defendant's house, arrested him and Bowers, and took them to Kosse and delivered them to a deputy sheriff from Groesbeck. The horse ridden by defendant to Kosse was a large bay animal, with a white spot on his belly, and the horse ridden

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by Bowers was a small bay animal—being the same horses they were riding on the previous evening. When arrested, defendant asked if witne· wanted his pistol. Witness replied that he did. Defendant then opened his trunk, exposing his pistol, which witness secured. It was a forty-four calibre, center fire British Bulldog pistol, and had not been recently discharged.

Cross examined, the witness said that defendant talked freely with him about traveling the Kosse-Franklin road with the other parties, on the fatal evening, and about his horse trade. He made no manner of resistance to arrest.

H. G. Sanders, the uncle of Mitch Sanders, testified, for the State, that he lived in Falls county, three miles northeast from Marlin. On his way to Marlin on Saturday, March 13 (14?), 1885, witness met his nephew, Mitch, and a man who called himself Scott, but whose name witness afterwards learned was John P. Bagwell, going to his house from towards Marlin. Their horses appeared to be jaded. Witness talked with them a few minutes and told them to go on to his house and that he would soon be back. When witness returned from Marlin he found the said parties at his house. They said they were going to a point below Kosse where they had a horse that would suit the witness for buggy work, and which they wanted to sell him. Witness declined to buy. They spent that night at witness's house, and on Sunday morning left, going towards Marlin. They acted suspiciously while at witness's house, going off to themselves with great frequency and talking privately.

John Stuart was the next witness for the State. He testified that he was the brother-in-law of the defendant—defendant's late wife being his sister. In March, 1885, the witness lived on the Bates place, near the house on the same place occupied by the defendant. On the thirteenth day of March, 1885, the witness began to plow with one of defendant's horses, a bay animal branded L4 on the shoulder, which said animal had a foot cut by wire. About an hour by sun on that evening the defendant came to the field and got the horse which witness was plowing, and told witness that he had traded that horse to some boys for some horses which witness afterwards saw in defendant's lot. That night the witness went to the defendant's house, where he found the defendant, his wife, Mrs. Ellen Button, Joe Bowers and John Sinclair. In the presence of those parties the defendant told the witness that he and Bowers and two men named Bag-

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well and Sanders came together from Kosse on that evening, and that en route, near the Persimmon pond, they mobbed the negro Sam Scott and a negro girl; that they overtook the negroes walking along the road when he, defendant, rode up and shot Sam Scott down; that the girl then fled, and that he pursued, overtook and shot and killed her; that the negroes did nothing for which they were killed. He then said that he was afraid of being mobbed on that night, and asked witness and Sinclair to get their guns and sit up with him that night. Witness and Sinclair got their guns and stayed at defendant's house until about eleven o'clock. While at supper the defendant kept his pistol across his lap. Had a mob come to defendant's house that night the witness would have done nothing to help or protect the defendant.

Cross examined, the witness said that he was now testifying on the fifth trial of this case, and that he testified on the trial of Mitch Sanders involving the same transaction. On each of the previous trials the witness testified to matter which, if true, would establish an alibi for the defendant and Sanders, and that he did not hear of the killing of the negroes until Saturday evening, and on cross examination on each trial, he testified that defendant had never at any time said anything to him about killing two negroes on the evening of March 13, 1885—all of which said testimony was utterly false. After the fourth trial of defendant the witness attempted to evade testifying again on this trial, and his bond as an attached witness was forfeited. He was finally caught. Mr. Mynatt was the first man to whom the witness told the truth about his knowledge of the facts in this case, and he explained to Mr. Mynatt that he was and had been afraid to testify to the truth,—that he was afraid of the defendant, his two brothers and half brother—which statement to Mynatt was true. Mr. Mynatt told him, however, that in testifying truthfully, he would be protected by the good citizens of the country, and he decided to do so. The reason why the witness suffered the forfeiture of his bond as a witness was that he did not want to again swear to lies for the defendant, and was afraid to swear to the truth.

James Sapp testified, for the State, that to his knowledge the defendant was acquainted with Mitch Sanders prior to the fatal March 13, 1885.

County Attorney Rice testified, for the State, that he prosecuted the defendant on his four previous trials for this offense.

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Mrs. Moody, defendant's wife, since deceased, testified on each of those trials that defendant, riding a brown horse named "Wide-Eye," and Bowers a gray mare, went to Kosse on March 13, 1885, and returned an hour and a half or two hours before sun set, bringing two strangers, whom she afterwards learned were named Bagwell and Sanders, with them; that the strangers and defendant and Bowers ate dinner saved over by her; that after dinner the defendant traded horses with the strangers, giving two horses and some boot for three horses; that the strangers then left, it being an hour or an hour and a half by sun, going back towards Kosse; that defendant, on getting home from Kosse, gave her Bates's pistol which he had; that she put it under the head of the bed, whence it was taken the next morning and given to Bates, and that she did not hear of the killing of the negroes until the day after it was done. She was then asked about N. B. Hamilton going to her house while defendant was confined in jail, and she answered that Hamilton came to her house one night after a cotton picking given by her, and after she had declined to give a dance, and her guests had gone, threatened to throw out her bed, cursed, and discharged his pistol inside and outside of her house, and then left.

This witness stated that on the said previous trials T. J. Bates testified that his pistol was loaded "all round" when he got it from defendant on the day after the tragedy, and that the cartridges appeared to have been in it for a long time, and that it had no appearance of having been recently discharged. John Stuart's testimony on the said previous trials was substantially as on this trial the said Stuart confessed it to have been. Z. L. Harlan, of counsel for the defendant on this and his previous trials, testified, for the State, substantially as did the witness Rice.

Joe Thomas testified, for the State, that in January, 1885, he sold to the defendant the brown horse known as "Wide-Eye," which horse the defendant subsequently used as his saddle horse. Witness saw that horse at defendant's lot about March 1, 1885, when the horse was shod in front with heavy cork shoes. Witness did not see that horse on March 13, 1885, and did not know whether or not the horse had on those shoes on that day.

The State closed.

Mrs. Ellen Button, the sister-in-law of the defendant, was his only witness. She testified that defendant and Joe Bowers went to Kosse on the fatal Friday morning, defendant riding

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the brown horse known as "Wide-Eye," and Bowers a gray mare; that they returned an hour and a half or two hours before sun set, bringing with them two strangers whose names afterwards transpired to be Bagwell and Sanders; that after eating dinner defendant went to the field and got the horse with which John Stuart was plowing, returned to the house and made a horse trade with the strangers, who afterwards left, going back towards Kosse; that she, the witness, did not hear of the murder of the negroes until the next day. She denied positively and emphatically that defendant made any such confession or statement about the killing of the negroes as testified by Stuart on this trial. She stated that Stuart came to the house immediately after defendant took the plow horse from him, but that he remained but a few moments, and that neither he nor Sinclair came there that night armed with guns.

Oltorf & Harlan, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Defendant's bills of exception to the admission of testimony over his objections are none of them well taken. Under the peculiar facts and circumstances of this case, as well as under the allegations in the indictment, the testimony was legitimate for the purpose of identifying the parties who perpetrated this most wanton and horrible murder. These bills of exception appear to have been waived or abandoned by counsel for appellant, as no mention is made of them in the able brief they have filed in this court.

The principal grounds argued and relied upon for a reversal are supposed defects and errors in the charge of the court to the jury. Appellant's fifth and sixth bills of exception present the only exceptions taken to the charge at the trial, and no requested instructions were asked in behalf of appellant. Taken as a whole, the charge, in our opinion, is not obnoxious to any of the objections urged against its correctness and sufficiency. In certain of the particulars complained of in the brief of counsel, but not excepted to, the charge would doubtless have been amplified, as it is contended ought to have been done, had special requested instructions been asked upon those points. Considering it as a whole, and in the absence of additional requested instructions, we find no substantial error, either of

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omission or commission, and it appears to have fully and sufficiently submitted the law applicable to all the legitimate phases of the case as made by the evidence.

It is most urgently insisted that the evidence is not sufficient to sustain the verdict and judgment. We are told that this is at least the fifth time this case has been tried, and that there have been four mistrials. One of the witnesses who testified for defendant on each of the other trials, and whose testimony established for him in part his defense, which was an alibi, on this last trial recanted his former statements and testified that defendant, on the evening of the homicide, when he arrived at his, defendant's home, actually confessed to him and others that he, this defendant, with his own hands, shot and killed both of the murdered parties. This witness was, besides, a brother-in law of defendant. If his testimony is to be believed, then, taken in connection with other facts in the case, there can be no question of this appellant's guilt. The judge and the jury who saw him upon the witness stand, and who heard him testify, must have given him credit for telling the truth on this, the fifth trial. It was for the jury alone to pass upon his credibility and the weight of his testimony. It is not for us to say that we might have done otherwise had we been one of their number, for of this it is impossible for us to determine, with nothing but the record before us. Suffice it for us to say that, with this evidence, the testimony disclosed in the record is amply sufficient to support the verdict and judgment, and, having found no error which authorizes us to reverse the case, the judgment is affirmed. *Affirmed.*

Opinion delivered March 2, 1889.

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No. 2578.

WILLIAM CHAPPELL *v.* THE STATE.

1. EXHIBITING A GAMING TABLE—EVIDENCE.—Whether or not the table on which the game was exhibited was made specifically for gaming purposes can not, ordinarily, affect the issue in a prosecution for exhibiting or keeping a gaming table for the purpose of gaming, it being "rather from the character of the playing, or the game which is played, that it (the table) receives its specific designation." Another test is that it is any table on which any game is played "which in common

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language is said to be played, dealt, kept or exhibited." The characteristics of a gaming table or bank, as correctly declared in Stearnes's case, 21 Texas, 693, are: "1. It is a game. 2. It has a keeper, dealer or exhibitor. 3. It is based on the principle of the one against the many—the keeper, dealer or exhibitor against the betters, directly or indirectly. 4. It must be exhibited for the purpose of obtaining betters."

SAME—"CRAPS"—CASE STATED—This indictment charges that the appellant * * * "did unlawfully keep for the purpose of gaming a gaming table used for gaming, to wit: for playing a game with dice, commonly called "craps.'" It was proved on the trial that "craps is played by one man taking two dice in his hand and throwing them on the table; and the man who throws bets on seven or eleven to win, and the other party bets against him. First one and then another will throw the dice. The game can be played on any flat surface." The same witness testified that he did not know that the accused had any interest in the saloon in which the game was played or in the table on which it was played; that he only knew "the defendant held the bets and received five cents for each two throws that were thrown." *Held*, that the proof does not support the allegation in the indictment. The table was in no way essential to the game, which could have been played on any flat surface; the game included no keeper or exhibitor, and was played only by the parties who participated in the throwing of the dice.

APPEAL from the Criminal District Court of Galveston. Tried below before the Hon. C. L. Cleveland.

This conviction was for exhibiting a gaming table, and the penalty assessed against the appellant was a fine of twenty-five dollars, and confinement in the county jail for ten days.

The opinion sets out the substance of the proof for the State, except that the testimony inculpated the defendant as the man who held the money bet by the crap thowers, and received the table fees of five cents for every two throws.

Charles Jessup testified, for the defense, that he was the exclusive owner and proprietor of the saloon in which the game was played, and of the table on which it was played. Defendant was his employe, had no interest whatever in the saloon or table, and, in receiving the table fees for the game played, acted under and by the orders of the witness, and for the witness.

Frank M. Spencer, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

WHITE, PRESIDING JUDGE. It is charged in the indictment that the defendant, "in the said county of Galveston, in the State of Texas, with force and arms then and there unlawfully did keep, for the purpose of gaming, a gaming table used for gaming, to wit, for playing a game with dice commonly called craps," etc.

As shown by the evidence, "the game of craps is played by one man taking two dice in his hand and throwing them on the table, and the man who throws bets on seven and eleven to win, and the other party bets against him; first one and then another will throw the dice. *The game can be played on any flat surface.*" The witness further said: "Don't know that the defendant had any interest in the saloon (in which the playing took place), or table on which the playing took place. I only know that he held the bets, and received five cents for each two throws that were thrown."

Our statute with regard to keeping or exhibiting a table or bank provides that, "if any person shall keep or exhibit for the purpose of gaming any gaming table or bank of any name or description whatever, or any table or bank used for gaming which has no name," etc., he shall be punished, etc. (Penal Code, art. 358.) With regard to the character of "table or bank," as used in article 358, it is expressly declared that "it being intended by the foregoing article to include every species of gaming device known by the name of table or bank of every kind whatever, this provision shall be construed to include any and all games which in common language are said to be *played, dealt, kept or exhibited.*" (Penal Code, art. 359.) Article 360 enumerates certain games which are specifically declared to be included, but further provides that "the enumeration of these games specially shall not exclude any other properly within the meaning of the two preceding articles." And article 361 provides that "in any indictment or information for the class of offenses named in the three preceeding articles it is sufficient to that the person accused kept a table or bank for gaming, or state exhibited a table or bank for gaming, without giving the name or description thereof, and without stating that the table or bank or gaming device was without any name, or that the name was unknown."

In the early case of Estes v. The State, 10 Texas, 300, it was in proof that defendant bet at a game called "rondo," played upon a billiard table. The court say: "We do not understand

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that it is litterally the table or structure, whatever that may be, on which the game is played that gives the character and designation of a gaming table; but it is rather from the charter of the playing, or the game which is played, that it receives its specific designation."

In the case of Stearnes v. The State, 21 Texas, 693, it was held that "Grand Raffle," as described in that case, was a gaming table exhibited for gaming. It was further said in that case that "it is difficult to imagine any species of table or bank, or gaming device resembling either, that is kept for gaming, that would not be included. Parties are liable to be misled by the words 'table and bank,' by attributing a meaning too restricted and literal." But in that case the leading elements characterizing a gaming table or bank are deduced and declared to be: 1. It is a game. 2. It has a keeper, dealer, or exhibitor. 3. It is based on the principle of one against the many—the keeper, dealer or exhibtor against the betters directly or indirectly. 4. It must be exhibited, that is, displayed, for the purpose of obtaining betters. And the description of the game in that case, had all "the leading characteristics of a common gaming table or bank, viz.: one against the many—the exhibitor with an interest in the game against the betters." There is no question in our minds but that the Stearnes case showed a case of exhibiting *a gaming table and bank.*

In Webb's case, 17 Texas Court of Appeals, 205, defendant was convicted upon a charge of unlawfully keeping and exhibiting "a bank for gaming purposes," the evidence showing that the game was fifteen ball pool, played upon a billiard or pool table, and in which game the loser was to pay for the drinks or cigars ordered from defendant's bar by those engaged in the game. It was held that the game proven was not *a bank* but a gaming table, and it was said "the statute uses the words gaming table *or* bank, evidently meaning two different things."

The question we have in the case before us is, do the facts in evidence support the allegation in the indictment that the defendant "kept for the purposes of gaming a gaming table?" It seems that the structure of the table—that is, whether it was made specifically for gaming purposes—can not ordinarily affect the question; "it is rather from the character of the playing or game which is played that it receives its specific designation." (Estes v. The State, supra.) Another test is any game which in common language is said to *be played,*

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dealt, kept or exhibited. Is the game of "craps," as described above, one which in common language is said to be *played, dealt, kept or exhibited* by a dealer or keeper? We think clearly not. There is no dealer or exhibitor in it. The game is played by the parties throwing the dice, the participants in the game, without the intervention of any third or outside party. All the defendant did was to collect five cents for every two throws by the players, evidently, we think, as pay for the use of his dice, and not for table fees. It might, with equal propriety, be claimed that he charged and collected the five cents for the privilege granted of permitting the parties to play the craps in his saloon as that it was for permitting them to play it on his table, the table not being in any manner essential to the game, it being a game which could be "played upon any flat surface," as upon his bar counter or the floor of the saloon. The character of the game would not cause any table or place upon which it was played to be designated as "a craps table" or a gaming table. It could be played as well upon a rock or a smooth surface of the ground as upon a table. A table is not in fact one of the essential elements of the game as we understand it, nor does it in any manner enter into the contemplation of the game as one of its requisites.

This case is in no essential particular different from Whitney's case, 10 Texas Court of Appeals, 377, in which case it was held that the evidence did not support the allegation in the indictment. We are satisfied of the correctness of that decision as to the particular facts of that case, and do not believe that it substantially conflicts with any of the decisions of the Supreme Court or of this court, when the facts of each particular case are considered in reference to the points decided in them.

We are clearly of opinion that the evidence in this case does not sustain the charge in the indictment, and the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered March 6, 1889.

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Statement of the case.

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No. 2633.

GEORGE NEELEY v. THE STATE.

THEFT—EVIDENCE—CHARGE OF THE COURT.—On a trial for horse theft the court admitted hearsay evidence of the contemporaneous theft of a saddle, which evidence, on motion of the defense, was stricken out. Thereafter evidence for the State was admitted identifying as the property of one P. a certain saddle found in the possession of the defendant when he was found in possession of the horse, and the court's charge limited the application of such evidence to the identification of the transaction and the intent of the defendant, etc. *Held*, that, in the absence of proof that the saddle was stolen, the evidence was erroneously admitted, and the charge was erroneous because not based upon legal proof.

APPEAL from the District Court of Wilson. Tried below before the Hon. George McCormick.

The conviction in this case was for the theft of a horse, and the penalty assessed against the appellant was a term of five years in the penitentiary.

R. S. Carnes testified that his certain horse, branded H4 connected, was stolen from his stable in the town of Stockdale, on the night of May 24, 1888, and he had never seen that animal since. He was accompanied in his search for that horse by Mr. Charles Palm, who claimed to have had a saddle stolen from him on the same night. Witness knew nothing about the theft of the saddle except what Palm told him. At this point the court, upon the defendant's motion, struck out the testimony of this witness as to what Palm told him about the theft of the saddle. The witness afterward saw a saddle in the possession of J. M. Sauer, which saddle he verily believed was the saddle of Charles Palm.

J. M. Sauer testified, for the State, that he was a deputy sheriff of Kimble county. On the thirty-first day of May, 1888, the witness made an affidavit before a justice of the peace of Kimble county, against the defendant, but not for the offense now on trial. On the day last mentioned the witness and Captain Jones, of the State ranger force, arrested defendant about two miles from Boerne, in said Kimble county. They confronted him suddenly on the road and ordered him to halt,

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instead of doing which he extended his person on his horse and fled. Witness and Jones then fired with intent to kill the horse, and thus secure defendant. They killed the horse and wounded defendant. The horse corresponded in description with the horse of the prosecuting witness Carnes. Witness had the saddle which he took from the said horse in court.

Captain Jones testified, for the State, circumstantially as did Sauer, except to the procurement of the warrant.

B. B. Mayes testified, for the State, that he had examined the saddle brought into court by the witness Sauer, and, while he did not wish to go on record as swearing positively to its identity, he was confident that it was the saddle of Charles Palm.

Burges & Dibbrell and *J. H. Burts*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for the theft of a horse. On the trial, hearsay evidence as to the theft of a saddle at or about the same time and place that the theft of the horse occurred was admitted, but upon motion of defendant was excluded. Thereafter evidence offered by the State was admitted identifying a saddle found in possession of the defendant at the same time he was found in possession of the alleged stolen horse, as a saddle belonging to one Palm. Defendant moved to exclude all testimony relating to said saddle, which motion the court overruled, and instructed the jury with respect to said testimony that it should not be considered unless it tended to show the identity of the transaction of the theft of the horse, or to explain the intent of the defendant, etc. This instruction was excepted to by the defendant.

We are of the opinion that the court erred in not excluding all the evidence relating to the saddle. There was no legal evidence before the jury that the saddle had been stolen, and the testimony in regard to it, and which the court refused to exclude, was irrelevant, and was calculated to prejudice the rights of the defendant, especially when the attention of the jury was directed to it by the charge of the court. There being no legal evidence relating to the theft of a saddle, or of other property than the horse, the instruction as to other stolen property was not warranted and was therefore error.

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Statement of the case.

It is unnecssary to notice other questions made in the record. For the errors mentioned the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered March 6, 1889.

No. 2724.

MILES REED v. THE STATE.

ASSAULT TO RAPE—NEWLY DISCOVERED EVIDENCE—NEW TRIAL.—The indictment in this case charged an assault to rape by force, and the allegation was supported by the testimony of the prosecutrix. The proof for the defense, however, not only contradicted her testimony materially, but tended to prove her consent. Upon this state of evidence the defense asked a new trial to produce newly discovered evidence strongly supporting the theory of consent. *Held* that, under the facts in proof, the new trial should have been awarded on the newly discovered evidence adduced by the defense.

APPEAL from the District Court of Williamson. Tried below before the Hon. W. M. Key.

The conviction in this case was for an assault with intent, by force, to rape one Sallie Colvin, in Williamson county, Texas, on the twenty-third day of November, 1888. The penalty assessed against the appellant was a term of four years in the penitentiary.

Sarah Colvin, the alleged injured party, was the first witness introduced by the State. She testified that she was eleven years old, and lived in the town of Georgetown, Williamson county, Texas. On the day alleged in the indictment, the witness went to a point in the brush near Georgetown, frequented by negroes for the purpose of answering calls of nature. The witness went there for that purpose. Defendant soon came to where she was and said to her: "Come and do it with me." Witness replied: "No, I will not; my mother does not allow me to do that." She then started home, when the defendant overtook, threw her down, pulled up her clothes, tore off her drawers, and by force, without her consent and against her

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will, had carnal knowledge of her, by inserting his male member into her sexual organ. During the period of this enforced act of copulation, the witness was held down by the defendant, who likewise kept one hand pressed over her mouth. She struggled with all of her strength, but was unable to push the defendant off, or to utter a cry for help. He remained on top of witness, moving his male member to and fro in her sexual organ, until witness's cousin, Dora Cook, suddenly appeared on the scene, when he jumped off and fled.

The cross examination of this witness, which was close and searching, was directed to the development of the issue raised by the defense of the witness's consent to the carnal act. It disclosed that the defendant was a local preacher of the Methodist Episcopal Church, and that he lived in a house near the house of the witness's mother, with whom the witness lived. The bushes to which the witness went to answer a call of nature were nearer the defendant's house than to the witness's mother's house, and in going to the said bushes from the last named house one would necessarily pass near the defendant's house. There were other bushes in the opposite direction from the witness's mother's house, but they were somewhat further off than the bushes to which the witness went. Both of said places were customarily used by the colored people as privies. On the day of but before the outrage, the witness went to the house of the defendant in search of her mother. The defendant was at home when witness arrived at his house, but not when she left it. He came to her in the bushes soon afterwards. The witness was on the outside of Lee Taylor's fence when the defendant asked her to copulate with him. She replied as stated in her direct examination, and crawled through the fence into Mr. Taylor's lot, and was stooping down picking up acorns when the defendant seized and threw her down and had forcible connection with her. She neither ran nor hallooed while the defendant, in a half run, was pursuing her, for the reason that she did not believe he would hurt her. From the point where he solicted the carnal favor of the witness to the point where he followed her and helped himself, the distance was about one hundred yards. When he seized her he put his left hand over her mouth, threw her down, and with his right hand pulled her legs apart, unbuttoned her drawers and tore them off one of her legs, took out his male member while on his knees between her legs, lay down on the witness, with his breast

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Statement of the case.

against hers, inserted his penis into her private organ, and made two or three excentric motions with his buttocks before he succeeded in introducing his penis into witness's private organ. He then continued the copulative process until Dora Cook intruded upon the scene, when he suddenly released the witness and decamped. He was on the witness but a short time As soon as she was released the witness raised up on her elbow, and saw Dora Cook through an opening in the fence Neither the witness nor Dora spoke to the other, nor did Dora cross the fence into the lot where the outrage occurred. The drawers worn by the witness were button drawers. Defendant first undid the buttons, and then tore the drawers off one leg. The place of the outrage was in the northwest corner of Mr. Taylor's lot, under a hill, about twenty-five steps from Taylor's house. The houses of Mr. Williams and Mr. Roberts were not a great distance from the place of the outrage. The witness reiterated that the copulative act was committed upon her by the defendant by force, without her consent, against her will, and despite such resistance as she was able to make. Asked by the defendant's counsel if she enjoyed the sexual act forced upon her, she replied that she did not, and, in response to the further inquiry of persistent counsel as to *why* she did not like it, she replied laconically: "Because I was mad."

Dora Cook, the cousin of the prosecutrix, testified, for the State, that on the day alleged in the indictment she went to the bushes in the rear of Mr. Taylor's lot for the purpose of responding to a call of nature. As she approached the northwest corner of Taylor's lot from the outside she saw the defendant on top of Sallie Colvin, "shuffling up and down" on Sallie, who was lying back down on the ground. His breast lay on Sallie's breast, and his face was held close to hers. As soon as he discovered the witness, the defendant jumped up and ran off. Sallie raised her head to rest on one elbow, and looked through the fence at witness. She did not speak to witness, nor did witness speak to her. Witness went immediately to Sallie's mother, reported what she had seen, and within a few minutes a complaint was lodged against defendant and he was arrested. Taylor's house stood in the southeast corner of his lot, diagonally across from the corner in which witness discovered defendant on Sallie Colvin. The said house was on a hill, and the said northwest corner of the lot was under the hill, some trees and brush intervening between the two points.

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Statement of the case.

Bettie Colvin, the mother of the prosecutrix, testified, for the State, that immediately on her return from the brush Dora Cook told her of the discovery by her of the defendant on witness's eleven year old daughter Sallie. Witness started at once to the place indicated, and met her said daughter coming toward home. Her daughter then told her about defendant's outrage upon her, and witness at once took the child to town and had a complaint lodged against defendant. She then examined the girl's underclothing, drawers and private parts. The drawers, which were not button drawers, and did not open in front, were ripped open between the legs at the place where they covered the private organ. They were not torn when Sallie put them on, the Sunday previous. Witness could not swear that defendant tore those drawers, but they were torn. Witness observed no blood on Sallie's private parts.

County Attorney R. A. John testified, for the State, that the corner of the fence in which Sallie Colvin claimed she was assaulted by the defendant was about two hundred and seventy feet distant from Taylor's house, and a little further from Roberts's house. A few trees, brush and undergrowth intervened between the said houses and the said corner, and, while witness would not swear positively that two persons copulating in said corner could not be seen from said houses, he did not think they could.

Doctor Foster testified, for the defense, that he examined the sexual organ of the girl Sallie Colvin about an hour after the outrage was alleged to have been committed. He found the girl's drawers torn, but there was nothing about the appearance of the sexual organ to indicate recent penetration. As a matter of fact her sexual organ had not been penetrated. It could not have been penetrated by the penis of such a man as the defendant without retaining indubitable evidence of such penetration.

Henry Smith and Monroe Sansom testified, for the defense, that they were familiar with the ground between the place of the alleged outrage and the houses of Taylor and Roberts, and in their opinion two persons copulating in the northwest corner of Taylor's lot could be seen from either house. It was possible, however, that, while lying on the ground, if copulating in that position, they could not be seen from Taylor's house. The opinion sets out the substance of the newly discovered evidence upon which the motion for new trial was based.

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No brief for the appellant on file.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for an assault with intent to commit rape.

The only issue upon the trial to be determined by the jury was consent *vel non*. If what the prosecutrix swore was the truth, appellant used the force required in such cases to accomplish his purpose. She is shown, however, not only to have sworn falsely regarding material matters, but her conduct, when they were discovered by Dora Cook, upon the hypothesis of rape, or assault to rape, was unnatural and inconsistent.

The issue being force or consent—force shown by the evidence of the prosecutrix, and consent strongly presented by the attending circumstances—we are of opinion that a new trial should have been granted to obtain the newly discovered evidence shown in the affidavit of Barbara and Alice Brown, Nellie Brown and Eliza Smith.

Barbara and Alice Brown swore "that, a few minutes after the alleged assault, the prosecutrix came to their house and told them that Miles Reed had got on top of her, and done it to her, and that Miles Reed gave her ten cents to let him do it; and that she showed them the ten cents, and said she was going up to town and buy some candy with it; that she would give them some of it; that she saw some women coming towards them and thought it was her mother and ran off, and when she found that it was not her mother she came back." Barbara relates the matter about the prosecutrix running off when she thought she saw her mother coming.

Nellie Brown saw the ten cents, and places the prosecutrix at her house with the children Barbara and Alice at the time sworn to by them.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered March 6, 1889.

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No. 2727.

WINNIE LUCAS *v.* THE STATE.

1. PERJURY—INDICTMENT.—The common law rule that an indictment for perjury must allege correctly the day on which the perjury was committed, and that a variance between the time alleged and that proved would be fatal, has been so changed by statute in this State, that the indictment need only allege some time anterior to the presentment of the same, and not so remote as to be barred by the statute of limitations; with which allegation the proof, to be sufficient, must concur.
2. MISCONDUCT OF THE JURY—NEW TRIAL.—When it is shown that a verdict of guilty was probably influenced by the statement of a juror to his colleagues assailing the credibility of a witness for the defendant, a new trial should be granted. See this case in illustration.

APPEAL from the District Court of Williamson. Tried below before the Hon. W. M. Key.

Upon a complaint filed by this defendant, charging that, in Williamson county, Texas, on the sixteenth day of December, 1888, one Sallie Brown did commit an assault and battery upon her by striking her with a rock, and did use abusive language to her, calculated to cause a breach of the peace, by calling her a "bitch," a "whore" and a "liar," the said Sallie Brown was tried in the justice's court of precinct number one of Williamson county, on the twenty-first day of December, 1888. Upon that trial the defendant appeared as prosecuting witness, and testified that, on the said sixteenth day of December, 1888, the said Sallie Brown did strike her with a rock, and did call her a "bitch, a whore and a liar." The testimony so delivered on that trial is the perjury assigned in indictment in this case.

The State proved that the defendant was sworn as a witness on the said trial of Sallie Brown, and that on that trial she testified as alleged in this indictment. Sallie Brown, who appeared on this trial as prosecuting witness, testified to the transaction between herself and the defendant on the said sixteenth day of December, 1888, and, among other things, that it was not true that she struck the defendant with a rock, and that she did not call the defendant either a "bitch," a "whore" or a "liar;" that, in fact, all of the quarreling which took place on that occasion was

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done by the defendant, and none of it by the witness. Several witnesses who were shown to have been present at the time of the alleged assault by the said Sallie Brown on the defendant testified that they did not see the said Sallie Brown strike the defendant with a rock or anything else, and did not hear her call the defendant either a "bitch," a "whore" or a "liar."

Insanity was the defense set up in this case. Sallie Brown, the prosecutrix, and other witnesses testified that the defendant was possessed of a very nervous and excitable temperament, and that, in their opinion, she was at intervals, and particularly when excited, totally crazy. The testimony, on this issue, of Elias Brown, the witness impugned by the two jurors in the manner set out in the second head note of this report and in the opinion of the court, was somewhat more specific and circumstantial than that of the other witnesses.

E. A. Strickland and *J. F. Taulbee*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. At common law an indictment for perjury must allege the day on which the perjury was committed, correctly, and a variance between the time alleged in the indictment and the time proved would be fatal. (2 Whart. Crim. Law, secs. 1291, 1314; Whart. Crim Ev., sec. 103; 1 Greenl. Ev., 87, 88.)

But this common law rule has been changed by statute in this State. All that is required as to the allegation of the time of the commission of the offense is that it state some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation. (Code Crim. Proc., art. 420.) And the date proved need not be the exact date alleged in the indictment. All that is required as to proof of the time is that the time of the commission of the offense be proved, and that the time proved be some date anterior to the presentment of the indictment, and not so remote as to show that a prosecution for the offense is barred by limitation. (Temple v. The State, 15 Texas Ct. App , 304.)

We are of the opinion that a new trial should have been granted the defendant because of the misconduct of two of the jurors in stating to the jury, while the case was being considered by the jury, that they knew the witness Elias Brown,

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who testified on the trial in behalf of defendant, and that he was a chicken thief, and, in their opinion, unworthy of credit, and had often lied to them. One of the jurors who made an affidavit in relation to said statements of said jurors, says that said statements did not influence his verdict, but may have had some influence on the verdict; that he heard a Mr. Price, who was on the jury, say that the talk did influence him. Three other jurors make affidavit that they heard said statements, but that their verdict was not influenced thereby. When a verdict was probably influenced by the statement of a juror to his fellows as to the character for credibility of a witness for the defendant, a new trial should be granted. (Anschicks v. The State, 6 Texas Ct. App., 524; McKissick v. The State, 26 Texas Ct. App., 673.) In this case it appears probable that at least one juror, Price, was influenced in his verdict by the statements of said two jurors as to the credibility of the defendant's witness, Elias Brown.

Such being the showing on the motion for a new trial, we think the court erred in refusing a new trial, and for this error the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered March 9, 1889.

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No. 2634.

GEORGE NEELEY *v.* THE STATE.

1. PRACTICE—EXEMPTION FROM PROSECUTION OF AN ACCUSED WHO TURNS STATE'S EVIDENCE.—A *particeps criminis* who, for the purpose of securing exemption from prosecution, agrees to testify in behalf of the State against his accomplices in crime, but who subsequently violates his agreement by refusing to testify in good faith fairly and fully to facts within his knowledge, can not claim the benefit of such agreement, and may be prosecuted and convicted, regardless thereof.
2. SAME—CONFESSION.—Under the common law, the confession made by the accused under his agreement to become State's evidence, can be used against him in a prosecution instituted because of his violation of his agreement. But, as heretofore held by this court, such confession, to be admissible, must have been voluntarily and freely made, uninfluenced by persuasion or compulsion; not induced by any promise

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Statement of the case.

creating hope of benefit, nor by threats creating fear of punishment. A promise, such as will render the confession inadmissible, must be positive, must be made or sanctioned by a person in authority, and must be of such character as would be likely to influence the party to speak untruthfully. A confession induced by the mere fear of legal punishment is not thereby rendered inadmissible.

3. SAME—CASE STATED.—The defendant in this case, being at large and not in custody, agreed with the county attorney to testify for the State against his accomplices in this and other thefts, upon the consideration of immunity to himself from prosecution for such offenses. He, however, repudiated the agreement, although, when he entered into it he made a confession which, upon his subsequent trial, was introduced in evidence against him. The proof shows that such confession was not voluntary, and that it was made upon the promise of exemption from prosecution. *Held* that, having violated his agreement to testify for the State, the accused was properly placed upon trial for the offense charged against him, and that the confession, being an involuntary one, was properly excluded upon that ground.

4. SAME.—But the trial court admitted the said confession under the provisions of article 750 of the Code of Criminal Procedure, which legalizes a confession in duress as evidence, if it states facts afterwards found to be true, and which conduce to establish the guilt of the accused. *Held* that, if verified in the manner prescribed by said article 750, such confession would be admissible. But in this case there is a total absence of verifying proof; wherefore, the trial court erred in admitting the confession in evidence.

APPEAL from the District Court of Wilson. Tried below before the Hon. George McCormick.

The conviction in this case was for the theft of seven head of cattle, the property of W. R. Park, in Wilson county, Texas, on the first day of February, 1887. The penalty assessed against the appellant was a term of two years in the penitentiary.

District Attorney Spooner testified, for the State, in substance, that, in November, 1887, he procured the arrest of defendant and of George Brown, Will Mathews and Will Chaney, on a charge of horse and cattle theft. Pending the examining trial in Wilson county, John McDaniel, the uncle of defendant, proposed to the witness that if he would agree to exempt the defendant from any prosecution for theft of horses or cattle about which he would testify, he, defendant, would turn State's evidence, and testify against the other parties charged in this case, and also in other theft cases. The witness told McDaniel that he would look into the matter and determine whether he

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would accept defendant as State's evidence. After the said examining trial, McDaniel renewed the proposition on behalf of defendant. He renewed it again in December when the witness, having satisfied himself that without more testimony than he had he could not sustain the prosecutions against the parties charged, and against one Barber and one Blain, who were also implicated in that and other thefts, agreed to confer with defendant, stipulating that he would make no agreement until he had heard the proposed evidence of the defendant, and satisfied himself that, wherein it was material, it could be corroborated. Accordingly McDaniel arranged a meeting between witness, Park and defendant. Referring to McDaniel's proposition, witness stated to defendant distinctly that if he, defendant, could and would give material evidence for the State, on the trials of the other parties named, and such as could be corroborated, and would take the stand, fearlessly, and "come up like a man," and give that testimony fully, circumstantially, and truthfully, he, witness, would accept him as State's evidence, and would not prosecute him for complicity in any of the said offenses; but that if he, the defendant, did not comply with those conditions literally and to the fullest extent, he, witness, would retire from the agreement and withdraw the exemption thus promised. The defendant accepted the conditions, and, in the presence of Park, made the following statement to the witness, which was then and there reduced to writing, and afterwards was read to defendant and pronounced by him to be correct. The said writing reads as follows:

"George Neeley says that he and George Brown and Jodie Blain took five head of W. R. Park's cattle out of the 'company' pasture, in Wilson county, about February, 1887. These cattle were branded CUT on hip, and two head in UNO on the ribs; at same time took seven head of W. D. Runnels's cattle, branded thus (reversed EHD connected) on hip; carried them to Barber's pasture, near Gonzales, Texas. These cattle were carried in a bunch of shipping cattle for J. D. Houston, in February. Jeff Griffin, George Simons and Bill Rogers assisted in taking the cattle over, and we met Mat Patton near Talley's. Patton turned out of the road to the left, and stood until the cattle passed by. These cattle were cut out at or near the bridge, known as the Jobe bridge, where cattle go under it into the river. Clarke Barber and George Brown took the

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Statement of the case.

stolen cattle on to his, Barber's, pasture. Hiram Stevenson came out to us and helped to drive the shipping cattle to the railroad pens."

After securing this written statement the witness had the parties named in it, except Blain, Barber and Brown, taken before the grand juries of Wilson and Gonzales counties, and secured the indictment of Blain, Barber, Brown, Chaney and Mathews—some in Wilson and some in Gonzales county. He then had defendant attached as a witness for the State against Blain and Brown. Defendant was in Gonzales when the term of the court was held, at which, under his agreement, he was to testify for the State, but got to drinking, and, notwithstanding the protest of the witness, continued to drink and to associate with the parties against whom he was to testify, until the first case was called, when he left town. Witness had him brought back by a deputy sheriff, but when he was placed on the stand he was so drunk he could testify to nothing, and the party on trial was acquitted. When, at the ensuing term of the Wilson county district court, the witness took up the other cases in which defendant was to testify, he ascertained that defendant, in attempting to leave the country, had been shot by officers. Being unable to get him to comply with his agreement, the witness had him indicted in this case.

W. R. Park, for the State, testified to the theft of the seven head of cattle belonging to him, from the "company" pasture, in Wilson county, in February, 1887, which cattle were branded and described as stated in defendant's written confession in evidence. The witness was present when the agreement between District Attorney Spooner and the defendant was entered into. He corroborated the testimony of Spooner as to the details of the conference in which that agreement was entered into, and identified the writing in evidence as the written statement of the defendant made on that occasion. He further stated that he attended the term of the district court of Gonzales county referred to by Spooner in his evidence, and corroborated Spooner as to the conduct and actions of the defendant at that time.

Hiram Stevenson (at the time referred to in defendant's confession, a stock drover in the employ of J. D. Houston) and Mat Patton, introduced as witnesses for the State, corroborated the confession of defendant so far as it referred to them.

Burges & Dibrell and *J. H. Burts*, for the appellant.

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W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for the theft of cattle, and is based upon a confession made by the defendant, admitted in evidence against him over his objections. With respect to said confession the facts are, substantially, that the defendant and others were under accusation for the theft of said cattle. Defendant's uncle, McDaniel, made repeated proposals to the district attorney that the defendant would testify as a witness in behalf of the State against said other parties accused of said theft, and testify also as to other thefts committed by said parties, upon condition that the defendant would not be prosecuted for said crimes.

In response to these proposals the district attorney had a conference with the defendant in which it was agreed that the defendant would testify in behalf of the State, and would testify to material facts against said parties as to said thefts, such facts as could be corroborated by other testimony, and that in consideration of his so testifying he would be exempted from prosecution for said theft; but that, should he violate said agreement and refuse to so testify, he would be liable to prosecution for said thefts. He thereupon made the confession introduced in evidence against him, and thereafter refused to fulfill his agreement with the district attorney to testify against said parties, and the district attorney caused him to be indicted for the theft to which his confession related. At the time he made said confession he was not in jail or other place of confinement, or in custody of an officer.

Having violated his agreement to testify in behalf of the State, the defendant was not entitled to exemption from prosecution by virtue of said agreement. It is well settled that where a *particeps criminis*, for the purpose of securing exemption from prosecution, agrees to testify in behalf of the State against his accomplices in crime, and violates such agreement by refusing to testify in good faith, fairly and fully to facts within his knowledge, he can not claim the benefit of such agreement and may be prosecuted and convicted regardless thereof. (1 Bish. Crim. Proc., sec. 1164; 1 Greenl. on Ev., sec. 379; Roscoe's Crim. Ev., secs. 132, 133; Whart. Cr. Ev., secs. 443, 656; Holmes v. The State, 20 Texas Ct. App., 517.) And the common law authorities above cited further lay it down that in such case the confession made by the defendant under

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such agreement may be used in evidence against him. (See also Com. v. Knapp, 10 Pick., 477, which holds the same doctrine.)

But this court has held, and we think correctly, that even in such case the confession is not admissible, unless it was voluntarily and freely made, uninfluenced by persuasion or compulsion, not induced by any promise creating hope of benefit, or any threats creating fear of punishment. A promise such as will render confession inadmissible must be positive, and made or sanctioned by a person in authority, and must be of such character as would be likely to influence the party to speak untruthfully. And a confession induced by the mere fear of legal punishment is not thereby rendered inadmissible. (Willson's Crim. Stat., sec. 2472.)

In this case, it is evident that the confession was induced by the hope of thereby securing immunity from prosecution and punishment for the theft of which defendant was accused. It was made upon the positive promise of the district attorney that, if the defendant would testify to the matters stated in the confession, he would not be prosecuted. Defendant's subsequent bad faith in refusing to so testify could not *per se* render said confession admissible evidence against him. It was not a voluntary confession within the meaning of the law, and, not being voluntary, was inadmissible upon the ground that he had violated his agreement to testify. (Womack v. The State, 16 Texas Ct. App., 178.)

The learned trial judge did not admit the confession in evidence upon the ground that it was a voluntary confession, such as was admissible under common law rules of evidence, and in this view we think he was correct. He admitted it under article 750 of the Code of Criminal Procedure, upon the ground that statements were therein made of facts and circumstances which were found to be true, which conduced to establish the guilt of the defendant, of the theft; and he instructed the jury that, if the confession had not been so verified, they should disregard it.

We are of the opinion that, although the confession was inadmissible at common law because not voluntary, and although not such a confession as is named in article 750, Code of Criminal Procedure, that is, one made by a person in jail or other place of confinement, or in custody of an officer, yet, if it was verified by other evidence as provided in said article, it would thereby be rendered admissible.

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Syllabus.

But there is no such verification of the confession in this case. No fact or circumstance was discovered by means of defendant's statement, which conduced to establish his guilt of the theft. The corroborating evidence was as to immaterial matters, not inculpatory of the defendant, and not matters found to be true by means of information afforded by defendant's statements. (Willson's Crim. Stat., sec. 2473.)

Such being the case, we are of the opinion that the court erred in admitting said confession in evidence, and for this error the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered March 9, 1889.

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No. 2715.

CLAY BROWN *v.* THE STATE.

1. RAPE—"FORCE"—CHARGE OF THE COURT.—Rape by force, as defined by article 528 of the Penal Code, is carnal knowledge of a woman, obtained by force, without her consent. "Force," as used in the said article, is such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case (Penal Code, art. 529), and upon a trial for rape by force it devolves upon the trial court to give in charge to the jury such statutory definition of "force."
2. SAME—ASSAULT TO RAPE.—To constitute the offense of assault with intent to rape by force, the offender must have committed an assault or assault and battery upon the female with the specific intent to rape by force, and the force thus intended must be such force as might reasonably be supposed to overcome resistance, taking into consideration the relative strength of the parties and the other circumstances in the case; and on a trial for assault with intent to rape by force the trial court must so instruct the jury. But see the opinion of Willson, Judge, dissenting from the ruling of the majority of the court, and holding that, though to constitute the offense of assault with intent to rape by force, the assault must be accompanied by the specific intent to rape by force, the character of the force intended is immaterial, and that it is not the duty of the trial court, upon a trial for assault with intent to rape by force, to give in charge to the jury the definition of "force," as prescribed by article 529 of the Penal Code.

APPEAL from the Criminal District Court of Galveston. Tried below before the Hon. C. L. Cleveland.

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Statement of the case.

The conviction in this case was for an assault with intent to rape Katie Ford, in Galveston county, Texas, on the first day of October, 1888. A term of seven years in the penitentiary was the penalty assessed against the appellant.

Katie Ford was the first witness for the State. She testified, in substance, that she was fourteen years old, and on the first day of October, 1888, resided with her mother and her sister Alice in the city of Galveston. She and her mother and her said sister retired on the night of the said day, occupying the same bed. Between one and two o'clock, at which time she was thoroughly awake, she felt a heavy pressure on her body, and remarked to her mother that there was a box on her. At that instant a hand clutched her throat, and her sister Alice exclaimed: "There is a black hand around her neck!" The defendant was then on top of witness, his knees pressing on her stomach, one hand on her thigh, and the other clutching her throat. Witness's mother, when Alice uttered the exclamation above stated, raised up in bed, when the defendant sprang out of the bed, off the witness, and fled towards the front door. Just before reaching the front door, he ignited a handful of matches to enable him to find the door, opened it and ran out, followed by the witness and her mother. The house stood in a yard, the front of the said house being about ten feet from the front gate. The moon was shining brightly on that night. On getting out of the house, the witness and her mother looked in front for the defendant, but saw no person. Witness's mother then went into the back yard through the back gate, leaving the witness near the gate in front. Within a very short time after witness's mother passed through the back door, the defendant, in rapid flight from the back yard, passed the witness at a very short distance, and ran out at the front gate. The witness, her sister and mother pursued him as far as the neighboring corner of the street, the latter exclaiming: "Fire! Murder! Help! Catch Clay Brown!" By the time the witness, her mother and sister got back to the house they found a number of persons, who had been attending a dance across the street, collected in front of the house. The witness stated that she was well acquainted with the defendant. Defendant had frequently caught the family horse for the witness, her mother or sister, and on such occasions would come into their yard. While in the said yard about two weeks before the assault upon witness, the defendant, while being

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passed by witness, remarked to her: "Some how, I like you all mighty well." Witness did not respond to this remark of the defendant, but pursued her way to the house. Witness had never had sexual intercourse with any man.

Cross examined, the witness denied that on the night of, and soon after the attempted outrage upon her, she told Mr. Potts that she did not know who assaulted her, and that she did not know whether the man was white or black. As a matter of fact she and her mother both knew who the man was, and that he was Clay Brown, this defendant, and her mother, knowing the assailant of the witness to be the defendant, cried, as she pursued him: "Catch Clay Brown!" The witness did not learn from Ada Dodds that Clay Brown was the man who assaulted her. and she had never talked with Ada Dodds on the subject of this assault.

Mrs. Ford, the mother of the prosecuting witness, testified for the State that she occupied the same bed with her daughters on the night of October 1, 1888. She did not rest well that night, in consequence, perhaps, of a dance that was in progress in a house nearly opposite to hers on the same street. Between twelve and one o'clock Alice related a dream she had had, when witness advised her to go to sleep. Some time afterwards, the witness not yet having gone to sleep, Katie remarked to witness that a big box was pressing on her. Alice exclaimed: "There is a big black hand around her neck!" Witness raised up in bed, when a man sprang off the bed and ran towards the door. He struck several matches together, opened the door and ran out. Witness followed, and, failing to see him out the front way, turned and looked into the back yard, where she saw and in the clear moon light recognized the defendant, who was pulling up and buttoning his pants. As soon as he saw witness he fled from the yard through the front gate, passing the witness's daughters at a very short distance. Witness and her daughters pursued the defendant as far as the nearest corner, the witness exclaiming: "Fire! Murder! Help! Catch Clay Brown!" When she and her daughters returned to the house, they found a large number of persons collected before the gate, to whom she reported what had occurred.

On her cross examination the witness denied that she told the several parties collected in front of her gate that she did not know the party who assaulted her daughter. and did not know whether he was a white or a black man. She made no such

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statement to Mr. Potts. She did know who the man was, and, in giving the alarm, she did not merely cry murder! and fire! but, as well, "Catch Clay Brown!" The witness never told Mrs. Jones nor any other party that she did not know who the man was. Ada Dodds did not tell the witness that the man was Clay Brown. The witness told her son that if he did not go to the police headquarters at once—that very night—and file complaint against defendant, she would go herself. Thereupon her said son left to go to the said headquarters. The testimony of Alice Ford was circumstantially the same as that of her mother and sister.

The State rested.

Julia Rhodes testified, for the defense, that the defendant came home about seven o'clock on the night of the alleged assault on Katie Ford. He at once complained of feeling unwell. About eight o'clock on the same night, Bob and Mary Anderson and Eddie James came to the house, and about half past eight o'clock the said parties and the witness and defendant went into the business part of the city for a walk. They entered but one store, in which the defendant purchased a shirt and a pair of shoes. They got back to the house about half past ten o'clock. Bob and Mary Anderson and Ed James left about half past eleven o'clock, when witness and defendant went to bed. About half past twelve o'clock Mr. Solomon knocked at the door. Defendant got up and went to the door in his underclothes, opened the door and talked to Mr. Solomon, who had come to collect some money for playing music at a recent birthday party given by defendant and witness. After Solomon left, the defendant came back to bed and remained in bed, without leaving it, until next morning.

S. A. Solomon testified, for the defense, that he resided in Harris county, and was in attendance upon this trial as an attached witness for the defense. About twelve o'clock on the night before he left Galveston, soon after the defendant gave a birthday party, the witness went to defendant's house to collect his pay for playing the music at said party. The defendant came to the door in his night clothes, complained of being unwell, talked with witness awhile, and went back to bed.

John Q. A. Potts testified, for the defense, that he lived with his mother in the house next to, but separated by a half lot from, the house of the Fords. The lattice gallery of the witness's house faced the Ford house. About one o'clock on the

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night of the alleged assault the witness was awakened by the cry of "fire! murder! thief!" Running out of his house to the sidewalk, the witness met Mrs. Ford and her daughters, who told him that a man had been in their house. Witness asked if it was a white or a black man. Mrs. Ford, in the presence and hearing of her daughters, replied that she did not know who it was. About that time a man whom witness did not know stepped forward and said: "It was a white man dressed in black, and he ran off down the alley." (This statement of the witness as to the declaration of the stranger, was stricken out by the court, and the defense excepted.) Soon afterward two ladies came from across the street from the direction of the house in which a ball was in progress, and one of them laughingly asked, "Why didn't you catch him?" Mrs. Ford heard the stranger say that the man who had been in her house was a white man, and did not deny or dispute the statement. Witness's mother was present and heard the conversation between witness and Mrs. Ford, as detailed above. On the following Monday morning, being the morning set for the examining trial of the defendant, the witness heard an angry altercation on Mrs. Ford's gallery between Mrs. Ford and her son, in the course of which he heard the son say to Mrs. Ford: "I am not going to court this morning to swear to a d—d lie for you nor anybody else." On the morning after the alleged assault the witness heard Katie Ford say: "Oh, we've got him! Mrs. Dodds said she just knew it was Clay Brown!"

On his cross examination, this witness said that he did not know whether or not he, witness, had a strain of negro, nor whether he was white or black.

Mrs. Potts, for the defense, corroborated her son as to the conversation between her said son and Mrs. Ford, just after the latter gave the alarm by crying "Fire! Murder! Thief!" If Mrs. Ford cried "Catch Clay Brown!" witness did not hear her. She also corroborated John Potts as to the altercation between Mrs. Ford and her son on Monday morning, when her son said: "I am not going to court to swear to a d—d lie for you or anybody else."

Mrs. Ford and Kate and Alice Ford, for the State, in rebuttal, adhered to their previous testimony in detail, and denied, seriatim, the statements testified to by J. Q. A. and Mrs. Potts. Mrs. Ford particularly denied that she talked or quarreled with her son about his testimony on the examining trial of the de-

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fendant, or that her son made any such statement as that contained in the testimony of the Pottses.

Mr. Ford testified, in rebuttal, that there was not an atom of truth in the testimony of the Pottses to the effect that he and his mother had a dispute about his testimony on the examining trial of the defendant. He was never spoken to by his mother about his testimony on that trial, before it occurred, and he made no such statement to his mother as that testified to by Mrs. and J. Q. A. Potts.

Police Officer Moran testified, for the State, that complaint against the defendant for assaulting to rape Katie Ford, was filed at public headquarters between two and three o'clock on the morning of the alleged assault.

W. L. Wilson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction was for an assault with intent to rape. As presented by the facts, an issue in the case was the intention of the appellant: Did he intend to have carnal knowledge of Katie Ford *by force* or with her consent?

The indictment alleges that the assault to rape was by force, threats and fraud. Threats and fraud are eliminated from the case because there is no proof of either. The State's case, then, is an assault with intent to rape *by force*, and to warrant conviction the evidence must show force, and this force must be of a certain character, viz: "Such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case." (Article 529, Penal Code.) This article constitutes a part of the definition of rape or assault to rape when force is relied on for conviction. Make this provision a component part of article 528, Penal Code, and we would have this definition of rape: Rape is the carnal knowledge of a woman without her consent obtained by such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and the other circumstances of the case.

An assault with intent to commit rape is constituted by an assault or assault and battery with intent to have carnal knowledge of the female by the use of such force as might reasonably

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be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. To be guilty of this offense the accused must have intended to accomplish his purpose by the use of this character of force. This proposition is absolutely correct; for, if his intention falls short of this, it would be impossible for him to be guilty of an assault with intent to rape. Because we have seen (threats and fraud not being in the case) that to constitute rape such force must be actually used. Therefore the conclusion is inevitable that, to be guilty of an assault with intent to rape, the accused must have intended to use such force; it being impossible for him to intend to rape without intending to do that which constitutes rape. These propositions are self-evident, demonstrating their inherent infallibility. The authorities are harmonious on this question. Mr. Bishop says: "An attempt is committed only when there is a specific intent to do a particular criminal thing, which intent imparts a special culpability to the act performed toward the doing. It can not be founded on mere general malevolence. When we say a man attempted to do a thing, we mean that he intended to do, specifically, it, and proceeded a certain way in the doing. The intent in the mind covers the thing in full; the act covers it only in part." [Sec. 731, 1 Bishop's Criminal Law.)

And the same author, in section 731, says: "The offender's purpose must be to commit an entire substantive crime; as, if the alleged offense is an assault with intent to commit rape, he must, to be guilty, have meant to use force, should it be necessary, to overcome the woman's will."

And again, in section 745, Mr. Bishop says: "There must, in the words of Cockburn, C. J., 'be an attempt which, if successful, constitutes the full offense.' There can be no doubt of the soundness of this doctrine. We have seen that, in law, a man does not intend to commit a particular offense if the act he intends would not, when fully performed, constitute such offense."

The conclusion from all the authorities is that nothing short of the specific intent to commit the substantive offense will answer. And in rape, and in assault with intent to commit rape, the party can not be said to intend to commit the substantive offense unless he uses or intends to use all such force as is necessary to overcome all resistance. And unless the jury are so charged, the charge will fail to inform them as to what is required to constitute the substantive crime.

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Dissenting opinion.

In rape under the circumstances all resistance must be overcome. In assaults to rape the accused must intend to overcome all resistance, and in passing upon the question as to whether the accused, in either rape or assault with intent to rape, did in rape, or intended to use in assault to rape, such force, relative strength of the parties, and all other circumstances must be looked to. In the substantive offense, rape, such force must be used. In the intended offense such force must have been intended; and if such force was intended, it will matter not that the accused did not have the ability to overcome resistance in fact. The assault, with intent by force (that force defined in article 529, Penal Code), to have carnal knowledge of the woman, is the test; and if these exist and concur the offense is complete. Just what facts and circumstances are sufficient to show an intention to resort to such force can never be enumerated; each case must depend upon its own circumstances.

The court below failed to define force. This should have been done, because article 529 is a part of the definition of rape, and for this reason enters into and constitutes one of the elements of assault with intent to rape.

The judgment is reversed and the cause remanded for another trial.

WILLSON, JUDGE. I do not assent to the proposition that in a prosecution for assault with intent to commit rape, it is essential for the court to charge that the force intended to be used must be such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. Such character of force is necessary to constitute rape by force, and in a prosecution for that offense it is essential that the court should so instruct the jury. (Penal Code, art. 529; Jenkins v. The State, 1 Texas Ct. App., 346; Jones v. The State, 10 Texas Ct. App., 552.) I do not think that article 529 of the Penal Code, defining the force necessary to constitute rape, applies or was intended to apply to an assault with intent to commit rape.

Our code provides that "An assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit such other offense, as of

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maiming, murder, rape, or robbery." (Penal Code, art. 506.) This seems to be the view entertained by this court in Carroll v. The State, 24 Texas Ct. App., 366.

According to my understanding of the statute, if a man assaults a woman with the specific intent to have carnal connection with her by force, against her will, he commits the offense of assault with intent to rape. The assault is the use or attempted use of force, and the *intent* requisite to constitute the crime is not an intent to use the force contemplated in article 529, supra, or any specific character of force, but is an intent to forcibly and against the will of the woman have carnal connection with her. The force intended to be used by the assaulting party may not be such as might reasonably be supposed would be sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case; yet, if there was an assault, and the assaulting party intended to ravish the woman, or at least to make the attempt to do so, taking the chances of being able to accomplish his design, I think he would be guilty of an assault with intent to rape.

To illustrate: A man meets a woman in daylight in a city on a public street, in the presence of hundreds of people. He is a small, delicate man; she is a large, athletic woman. He assaults her and attempts to throw her down, and the evidence conclusively shows that his intent is to have carnal knowledge of her without her consent. He could not reasonably suppose that he could overcome her resistance or that the people present would allow him to accomplish his design, yet he may unreasonably believe that perchance he can succeed, and may make the effort under such unreasonable belief, willing to take the chances of the venture. Would he be guilty of an assault with intent to rape? I think he would, but, under the opinion of a majority of the court, as I understand it, he would not be guilty of that offense. It is with deference and hesitation that I dissent from the opinion of the court, which opinion, I concede, is supported by authority. My dissent is founded upon articles 503 and 506 of our Penal Code, and with reference to which article 529 has no connection or applicability, in my opinion. I think the charge of the court in this case was unobjectionable, and that the conviction should not be set aside upon the ground of the insufficiency of said charge. *Reversed and remanded.*

Opinion delivered March 9, 1889.

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Statement of the case.

No. 2722.

J. B. O'BRYAN v. THE STATE.

1. INDICTMENT—TERMS CONSTRUED.—"Writing" or "written," as those terms are used in the statutes of this State, include "printing" or "printed"; and it is not a valid objection to an indictment that it is partly written and partly printed.
2. SAME—FALSE SWEARING—PERJURY.—The affidavit of a public free school teacher to the voucher for his salary is "required by law," and therefore, if false, is matter assignable for perjury, and not for the distinct offense of false swearing.
3. A COUNTY JUDGE is an officer authorized to take affidavits in the body of his county.
4. CHARGE OF THE COURT—VERDICT—PRACTICE IN THE COURT OF APPEALS.—In its preliminary statement to the jury the charge of the court designates the offense on trial as "false swearing," but subsequently designates it as perjury,—the offense charged in the indictment. The verdict was general, and found the defendant "guilty," and assessed his penalty at five years in the penitentiary, the minimum penalty for perjury, and the maximum penalty for false swearing. The judgment of the court on the verdict declares the defendant "guilty of false swearing as found by the jury," but the final judgment and sentence declare that he has been "adjudged guilty of perjury." The State moves this court to reform the judgment and sentence so as to conform them to the verdict, maintaining that, as the verdict is general, it responds to the indictment, which charges perjury. But *held* that though this court, in cases wherein the verdict is certain, will exercise its power to conform the judgment or sentence, or both, thereto, it will not do so in cases wherein, as in this case, there is any uncertainty about the import of the verdict.

APPEAL from the District Court of Navarro. Tried below before L. J. Farrar, Esq., Special Judge.

The appellant rendered an account against the county of Navarro for services performed by him as a teacher of one of the public schools of that county, and made an affidavit before the county judge verifying the same. The said affidavit is the matter assigned as perjury. His trial resulted in a verdict of guilty, and his punishment was assessed at a term of five years in the penitentiary.

None of the rulings of this court involve the evidence adduced on the trial.

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William & C. W. Croft, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Whilst it is declared by statute that "an indictment is the *written* statement of a grand jury accusing a person therein named of some act or omission which by law is declared to be an offense," (Code Crim. Proc., art., 419), still it is no objection to its validity that it is in form partly printed and partly written. The word "*writing*" or "*written*," under our statutes, civil as well as criminal, includes "*printing*." (Rev. Stats., art. 3140, subdivis. 3; Penal Code, art. 30; Wise v. The State, 5 Texas Ct. App., 621.)

The affidavit made by a public free school teacher to the voucher or check drawn by the trustees on the county treasurer for his pay, as required by article 3776, Revised Statute, is a legitimate subject upon which perjury may be assigned. (Penal Code, art. 188.) It is an oath required by law, and, if falsely made or taken, is "perjury" and not "false swearing," the latter being a voluntary declaration or affidavit which is not required by law or made in the course of a judicial proceeding. (Penal Code, art. 196; Willson's Crim. Stats., sec. 316.) Any affidavit taken within this State may be made before a county judge within his county. (Rev. Stats., art. 7, subdivis. 1.) The indictment in this case is sufficient to charge and does sufficiently charge the crime of perjury. (Anderson v. The State, 20 Texas Ct. App., 312.)

In his preliminary statement of the nature of the case, in the charge to the jury, the learned special judge told them that the defendant stood charged by indictment with "false swearing." This was evidently an inadvertence for the law as announced in the remainder of the charge relates alone to the crime of perjury as applied to the facts, and the jury were explicitly instructed that defendant, if guilty under the law and the facts, would be guilty of perjury, and his punishment should be assessed as is provided for that crime. It may be the jury could not have been misled as to the nature and character of the crime for which they were trying the accused. But their verdict is in these general terms: "We the jury find the defendant guilty and assess his penalty at five years confinement in the State penitentiary." This period of punishment is the lowest affixed to perjury (Penal Code, art. 194), and the highest affixed to false swearing. The judgment

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which was rendered upon this verdict by the court is a judgment denouncing the defendant as "guilty of the offense of false swearing as found by the jury."

If the verdict and judgment are, as stated, for false swearing, then they are not warranted by the indictment, which alone charges perjury, which is a separate and distinct offense from false swearing. In the final judgment and sentence of the defendant it is recited and declared that he "has been adjudged guilty of the offense of perjury." We are asked by the Assistant Attorney General to exercise our authority under article 869 of the Code of Criminal Procedure, and reform and correct the judgment as required by the law and the nature of the case. In a proper case this court will reform either the judgment or sentence, or both, so as to make them conform to each other and to the verdict. (Rivers v. The State, 10 Texas Ct. App., 177; Hill v. The State, Id., 673; McDonald v. The State, 14 Texas Ct. App., 504; Short v. The State, 23 Texas Ct. App., 312; Robinson v. The State, 24 Texas Ct. App., 4.)

But in no case has this court ever exercised the authority to reform a judgment where there was any uncertainty whatever as to the verdict. It is the verdict which constitutes the basis of all judgments, and. where it is certain, judgments to be rendered thereon should and may be made to conform thereto. But where it is uncertain what the finding is, the judgment has nothing by which it can be reformed. In this case the jury were told that the defendant was being tried upon an indictment which charged him with false swearing, and, for aught that appears. they may have intended to find him guilty of that offense. Such a conclusion is not unwarranted by their verdict, and the court certainly, it seems, so understood the tenor and effect of the verdict, because the judgment rendered upon it was for false swearing.

We are not willing to assume, nor do we feel that we would be warranted in assuming, the responsibility of changing or reforming the judgment where there is such uncertainty about it. We feel that the safer course will be to have the matter made certain by another trial.

The judgment is reversed because not warranted by the charge in the indictment nor by the evidence adduced at the trial, the charge in the indictment being for perjury.

Reversed and remanded.

Opinion delivered March 9, 1889.

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No. 2555.

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HENRY BAUTSCH *v.* THE CITY OF GALVESTON.

1. APPEAL FROM MUNICIPAL COURTS—JURISDICTION.—Being convicted and fined in the recorder's court of Galveston City for a violation of a penal ordinance of the city, the defendant appealed to the criminal district court of Galveston county, by which court his appeal was dismissed on the ground that it had no jurisdiction of such municipal offenses, inasmuch as no right of appeal in such cases was conferred by the special charter of Galveston City, nor by the laws of the State; and because the offense was not against the laws of the State nor prosecuted in the name of "The State of Texas." *Held* that the appeal was erroneously dismissed. See the opinion in extenso for a collocation and construction of the various statutory provisions relevant to the question.
2. SAME—RIGHT OF APPEAL.—In all criminal cases tried before mayors and recorders of incorporated cities, the general policy and intent of the statutes of Texas secure to defendants a right of appeal commensurate with that from convictions in justices' courts. The fact that the special charter of a city wholly ignores such right of appeal from convictions for violation of the municipal ordinances can not frustrate the right of appeal from such convictions, notwithstanding the municipal offense consists in an act which is not penal under the general laws of the State.
3. PROSECUTIONS FOR MUNICIPAL OFFENSES—PRACTICE.—All prosecutions for State offenses must be carried on in the name of "The State of Texas," but an incorporated city may ordain that violations of its penal ordinances may be prosecuted in its municipal name. (Ex parte Boland, 11 Texas Ct. App., 159, approved on this subject.)

APPEAL from the Criminal District Court of Galveston county. Tried below before the Hon. Gustave Cook.

All material facts appear in the opinion. The penalty assessed was a fine of one hundred dollars.

F. M. Spencer and *W. B. Lockhart*, for the appellant: In support of our proposition that the criminal district court of Galveston county has jurisdiction to hear appeals from the recorder's court of the city of Galveston, in convictions for the violation of the city ordinances, we respectfully refer the court to the following authorities: Constitution of Texas, section 1, article 5; Drum v. The City of Fort Worth, 25 Texas Court of

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Appeals, 664; Casey v. The City of Paris, unreported; Revised Statutes, article 1497; Penal Code, articles 26, 837, 856 and 857; Code of Criminal Procedure, article 839.

W. L. Davidson, Assistant Attorney General, *contra*.

George P. Finley, City Attorney of Galveston, also *contra:* The appeal to the criminal district court of Galveston was properly dismissed by that tribunal. (Rev. Stats., art. 361; Charter of City of Galveston, secs. 17 and 159; Penal Code, art. 26; Code Crim. Proc., arts. 52, 56, 78, 79, 837, 838, 839, 894 and 895.)

Article 837 of the Code of Criminal Procedure provides that "a defendant in any criminal action, upon conviction, has the right of appeal under the rules hereinafter prescribed."

Article 26, Penal Code, provides that "a 'criminal action' as used in this code means the whole and any part of the procedure which the law provides for bringing offenders to justice." Article 61, Code of Criminal Procedure, under the head of definitions, defines a criminal action as follows: "A criminal action is prosecuted in the name of the State of Texas against the person accused, and is conducted by some officer or person acting under the authority of the State, in accordance with its laws."

Counsel for the city respectfully submits that the case at bar is not a criminal action as herein defined; that it is not prosecuted in the name of the State of Texas against the accused, and is not conducted by some officer or person acting under the authority of the State in accordance with its laws, and therefore it is not a criminal action which entitles the defendant to the right of appeal under article 837, Code Criminal Procedure.

Section 17 of the Galveston City charter defines the jurisdiction and powers of the recorder's court, and it nowhere provides for the right of appeal. But, to compensate for this, section 159 of the charter provides that the city council shall have the power to remit fines and penalties belonging to the city.

Neither the city charter nor the Code of Criminal Procedure provides for an appeal from the recorder's court, and in the absence of such a provision the court below was correct in dismissing the appeal.

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Opinion of the court.

The unreported case of Casey v. City of Paris, cited by appellant and filed with his brief, and Drum v. The City of Fort Worth, 25 Texas Ct. App., 664, do not decide the point of jurisdiction in this case, as both Fort Worth and Paris are incorporated under the general incorporation law of the State, which provides: "That all prosecutions, trials and proceedings had in said court (recorder's court), under this title, shall be governed by the laws and rules regulating trials, prosecutions and proceeding in justices' courts, in force at the time." (Art. 361, Rev. Stat.) This provision is broad enough to admit of an appeal from a recorder's court, and its existence certainly accounts for the fact that the question of jurisdiction did not arise in the above quoted cases.

It is submitted that it was not intended that there should be an appeal from the recorder's court of the city of Galveston; that such appeals have never been allowed by the criminal district court of Galveston county, and that in the absence of some law—either charter or general law—providing therefor, this court must decide the law as it finds it, and therefore affirm the decision of the court below.

WHITE, PRESIDING JUDGE. Appellant was convicted and fined in the recorder's court of the city of Galveston for a violation of an ordinance of the city. His conviction was for an offense unknown as such to our Penal Code, viz: repairing a wooden building in the city of Galveston in violation of the city ordinances. The proceeding was instituted by a complaint filed in the recorder's court, and the trial was by jury and resulted in defendant being fined in the sum of one hundred dollars and costs. From that judgment the defendant appealed to the criminal district court, in which court the city attorney filed a motion to dismiss the cause upon the following grounds, viz:

"1. This court has no jurisdiction to try a cause for a violation of a municipal ordinance of the city of Galveston. 2. The charter of the city of Galveston, in creating a recorder's court, does not provide for an appeal by the defendant in case of conviction. 3. The Code of Criminal Procedure does not provide for an appeal from a recorder's court, except for violations of the Penal Code which are cognizable before a justice of the peace, or before a recorder acting in his capacity as ex officio justice of the peace," etc. This motion was sustained

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and the appeal dismissed, and from that judgment this appeal is prosecuted.

It seems that the city of Galveston is incorporated under a special charter and not under the provisions of the general law as contained in title 17 of the Revised Statutes. (Arts. 340–541 b.) We have not been furnished with, nor have we had access to, the special charter, but it appears to be conceded by attorneys on both sides of this case that in such cases no right of appeal from the recorder's court is conferred or denied, but that the charter is simply silent upon the subject. Such being the case the question is whether or not the right of appeal, being neither expressly withheld nor denied by the charter, it would obtain otherwise under the general statutes.

Under provisions of our general law it is expressly declared that "all prosecutions, trials and proceedings had in said court (recorder's) under this title shall be governed by the laws and rules regulating trials, prosecutions and proceedings in justices courts in force at the time." (Rev. Stats., art. 361.) And under articles 894, 895 and 896 of our Code of Criminal Procedure, mayors and recorders are empowered to exercise within the corporate limits the same criminal jurisdiction, are governed by the same rules and have concurrent jurisdiction with justices of the peace. (Code Crim. Proc., art. 78.) By article 837, Code Criminal Procedure, defendant in any criminal action is given the right of appeal under the rules prescribed thereafter. And by article 839 it is provided that "appeals from judgments rendered by justices of the peace and other inferior courts, in criminal actions, shall be heard by the county court, except in counties where there is a criminal district court, in which counties such appeal shall be heard by such criminal district court." By article 1497 of the Revised Statutes it is declared that the criminal district court of Galveston and Harris counties "shall have exclusive appellate jurisdiction over all criminal cases tried and determined by justices of the peace, mayors and recorders in the said counties of Galveston and Harris, under the same rules and regulations provided by law from justices of the peace, mayors and recorders to the county court in criminal cases."

But it is contended that all these provisions refer to and were only intended, if they can apply at all, to *criminal cases* or to *criminal actions*, and that the case under consideration does not come within the definition of a "criminal action" or a

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"criminal case," and consequently does not, everything else being equal, come within the rules prescribed for such cases. We are cited to article 26 of the Penal Code and article 61 of the Code of Criminal Procedure for the definition of *criminal action*, as follows: "A *criminal action*, as used in this code, means the whole and any part of the procedure which the law provides for bringing offenders to justice;" "and a criminal action is prosecuted in the name of the the State of Texas against the person accused, and is conducted by some officer or person acting under the authority of the State, in accordance with its laws."

"An offense which a justice of the peace or the mayor or other officer of a town or city may try and punish is called a petty offense." (Penal Code, art. 56.)

We think the distinction sought to be drawn and made between "criminal actions" and "offenses" or "petty offenses" is hypercritical and not maintainable. It is expressly declared in terms by the code that "the provisions of this code shall be liberally construed so as to obtain the objects intended by the Legislature, the prevention, suppression and punishment of crime." (Code Crim. Proc., art. 26.) Every provision of the code governing justices courts applies to mayors' and recorders' courts. (Code Crim. Proc., arts. 78, 895.)

Nor do we think there is anything in the position that the rules do not apply to this class of cases because they are not prosecuted in the name of "The State of Texas." "Though all prosecutions for offenses against the laws of the State must be carried on in the name of 'The State of Texas,' yet an incorporated city or town may ordain that offenders shall be prosecuted in the name of the municipality." "It is only necessary that the prosecutions should be carried on in the name of the State when the prosecution shall be for a violation of the laws of the State." (Ex parte Boland, 11 Texas Ct. App., 159.)

It is unquestionably the general object and purpose of our statutes to give the right of appeal in all cases tried before mayors and recorders, to the same extent and in the same manner as they are permitted to be prosecuted from justices courts. The charter of the city of Galveston, as we understand it, does neither limit nor withhold this right—in fact is wholly silent upon the subject. The charter, being a special one, it should have expressly regulated the matter if it was intended that a different rule should obtain than that provided for cities incor-

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Syllabus.

porated under the general law. Not having done so, we hold that the rules announced by the general law and the policy of the law govern the question, and that in all criminal cases for violations of the city ordinances of the city of Galveston, tried by the mayor or recorder, an appeal lies to the criminal district court under the same regulations as apply to justices' trials.

We are of opinion the court below erred in dismissing the appeal for want of jurisdiction, and the judgment is reversed and the cause remanded for trial in said court.

Reversed and remanded.

Opinion delivered March 18, 1889.

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No. 2725.

A. P. THURMOND v. THE STATE.

1. PRACTICE—CHANGE OF VENUE.—The trial court, of its own motion, changed the venue from V. county, in which the indictment was presented, to D. county, whereupon the defendant, in the district court of V. county, moved to vacate the said order, and requested the venue to be changed to another than D. county, upon the ground that an influential combination, etc., existed against him in D. county. The court overruling the motion and denying the request, the defendant excepted. *Held* that the ruling of the court was not error. The remedy of the defendant was in the district court of D. county, from which, upon a showing of sufficient cause, he would have been entitled to a change of the venue.
2. SAME—EVIDENCE TO SUSTAIN REPUTATION—PREDICATE.—The State introduced a witness who testified to a confession made by the accused, and subsequently introduced witnesses to support the reputation for truth and veracity of the witness by whom the confession was proved. Those witnesses testified that for several years preceding the removal of the said witness (about eighteen months before the trial) they lived in the same neighborhood with him. The defense objected that this evidence did not establish the necessary predicate for the supporting testimony. But *held* that the predicate was sufficient.
3. SAME—IMPEACHING TESTIMONY—CHARGE OF THE COURT.—It is only under extraordinary or peculiar circumstances that it is proper for the trial court to instruct the jury as to the law governing impeaching testimony, and the failure of the court to do so in this case was not error.
4. SAME.—A witness for the defense testified that he saw the killing; that one Owens and not defendant shot and killed the deceased, and that the defendant was not present at the time of the killing. The

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State produced several witnesses who testified that the reputation of the said defense witness for truth and veracity was infamous. To support the credibility of its said witness, the defense offered to prove that he testified to the same facts on previous trials involving the same subject matter. *Held* that the rejection of the said proposed proof was correct.

5. SAME—REASONABLE DOUBT.—The charge of the court on the doctrine of reasonable doubt is sufficient if it applies the said doctrine to the whole case.

6. SAME—CORROBORATION OF ACCOMPLICE TESTIMONY.—See the statement of the case for a charge of the court upon the law applicable to the corroboration of accomplice testimony, *held* sufficient.

7. SAME.—Upon the ground that it was warranted neither by the indictment nor the evidence on the trial, the defense excepted to the charge of the court to the effect that the jury might convict if they believed that Owens killed the deceased, and that defendant was present, and knowing the unlawful intent of Owens, aided him by act or encouraged him by word or gesture in the commission of the act. *Held* that the legality of such charge can not be made to depend upon a corresponding allegation in the indictment, and that the evidence on the trial fairly raised the issue; wherefore the charge was correct.

8. SAME—ACCOMPLICE TESTIMONY.—The defense requested the following special instruction: "You are further instructed that, if you believe from the evidence that the witness Owens was testifying to save himself from punishment or moral obliquy of guilt, then his testimony can not be convicted upon, unless corroborated as the evidence of an accomplice." *Held* that the court did not err in refusing the instruction.

APPEAL from the District Court of DeWitt, on change of venue from Victoria. Tried below before the Hon. H. C. Pleasants.

The appellant in this case was convicted in the second degree for the murder of Lewellen Sloan, on the third day of January, 1887, in Victoria county, Texas. The penalty assessed against him was a term of fifteen years in the penitentiary. The venue of the case was changed from Victoria to DeWitt county, by the court of its own motion.

T. A. Cahill was the first witness for the State. He testified that he lived in the town of Victoria, Texas, in January, 1887, and was employed at that time as a private night watchman at what was then known as the Wertheimer, but is now known as the Schwartz corner. After supper, on the evening of January 3, 1887, the witness stepped into Sitterlee's saloon, in Victoria, and there met the deceased, who was very much un-

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Statement of the case.

der the influence of liquor, and, as usual, when in such condition, he was very boisterous and disorderly. Louis Sitterlee, one of the proprietors of the saloon, requested the defendant, who was present, and who at that time was a deputy sheriff, to keep deceased out of the saloon. Defendant agreed to do so.

The witness then left the saloon but soon returned, finding the deceased flourishing a pistol and creating a disturbance. The defendant was then standing near the deceased. Witness called his attention to deceased's conduct and pistol. Defendant replied that he cared nothing for the deceased's pistol. Soon afterwards George Williams succeeded in getting the pistol away from deceased, and deceased turned and appealed to the defendant to recover his pistol for him. Defendant replied to him: "You don't need a pistol." Soon after this the witness left Sitterlee's saloon, met city marshal Ragland, and reported to him that deceased was drunk and disorderly and ought to be locked up. Ragland then got defendant and the two went to Jecker's saloon, whither the deceased had gone from Sitterlee's saloon. Witness followed. Deceased was found at the bar of Jecker's saloon, talking with John Dyson. Ragland and defendant seized deceased and escorted him out of the saloon, followed by witness and Ed Sitterlee and R. L. Owens. After they got outside defendant asked Ragland if the calaboose was a safe enough place to confine deceased. Ragland replied that it was not, when, at the suggestion of defendant, they took deceased to the jail, and put him in the sheriff's private office. When the jail was reached, deceased several times appealed to Ed Sitterlee and others present to become bail for him so that he might be released. Ragland replied to that appeal that he would not take bond. Defendant, addressing deceased, said: "Sloan, behave yourself now, and I will get you a bond that Ragland will have to take." Deceased replied to defendant: "Al., I know you are my friend." Defendant then closed the door, leaving the deceased in the office. Witness told defendant that if he left deceased alone in the office he, deceased, would "break things up." Defendant replied: "No he won't. He thinks I am going to get bond for him and will be quiet." Witness and defendant then went to Jecker's saloon, where defendant requested witness to write a note for him to his uncle, sheriff C. L. Thurmond, to send him the keys to the jail cells. R. L. Owens, who was present,

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proffered to and wrote the note, which was dispatched to the sheriff by Luis Garza.

A short time afterwards the witness, while standing on the street, saw somebody moving about the jail yard with a lantern. He then went to Sitterlee's saloon, where he found the defendant playing cards. He and defendant went to the jail, where they found sheriff Thurmond, swearing and cursing in a violent manner. He, sheriff Thurmond, turned on defendant and abused him severely for putting deceased in his office, and declared that deceased had set fire to and burned valuable papers and books pertaining to his office, and that he, the sheriff, was ruined, as those papers could not be replaced. Papers were then burning in the office, and, in the confusion which attended the efforts of the parties present to rescue some of them from the fire, the deceased escaped. About that time some person reported that deceased had gone in a westerly direction from the jail, and the witness and Ragland went a short distance in that direction in pursuit of deceased. Failing to find or hear anything of him, Ragland said: "He has gone home. Let him go; I have no place to put him, any way." Witness and Ragland then returned to the jail, and found old man Thurmond still abusing the defendant for putting the deceased in the office. Witness then called defendant out and advised him to let the old man alone for the present. Defendant replied that the occurrence pained him very much. He and witness then went from the jail to the court house yard gate, where they met Ragland, R. L. Owens and Luis Garza. At the same time witness observed another man, whom he did not recognize, and whose identity he has never yet fixed, standing under a tree, a short distance from the said gate. Witness again cautioned defendant to say nothing to his uncle, the sheriff, for the present, and left defendant and Owens and Garza at the said gate, and with Ragland went back to town.

At a later hour on that night the witness was informed that some shots had been fired in the vicinity of the jail. He started hurriedly to the jail, overtook Ragland, and went with him to the court house, in the yard of which, near the cistern, they found sheriff Thurmond with a lantern. Witness asked him where the shooting occurred. He pointed towards the northwest corner of the court yard, and said: "Over there." Witness and Ragland went in the direction indicated. Witness mounted the west fence of the court house yard, and from the

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top of that fence saw the dead body of the deceased lying in the street. He then called to sheriff Thurmond: "Here he is, dead." Sheriff Thurmond replied: "Don't touch him. I will be there in a minute." Sheriff Thurmond soon arrived, when the body and the space around it were unsuccessfully searched for a pistol or other weapon. The coroner was then sent for, and witness went back to his post at the Schwartz corner. En route the witness met defendant, who asked him if it was true that Sloan was dead? Witness replied that it was, to which defendant replied: "Oh! You are joking!" Soon afterwards, at a point near Sitterlee's saloon, witness met Owens, who asked him if it was true that Sloan was dead, and who, on being answered in the affirmative, said, "you are joking."

Witness next met the defendant about four o'clock a. m., on Main street near Levy's corner. He was with Ragland. With those two parties the witness walked towards Regan's corner. The subject of Sloan's death came up, when witness remarked that Sloan brought his death upon himself. Defendant replied: "You are wrong, Cahill. I knew Sloan well. I went to school with him, and I know he was a good boy. I have been in a great deal of trouble, Mr. Cahill, but this is the worst I ever had. If I had a million dollars I would give it all to get my uncle out of his trouble by restoring his papers destroyed by Sloan." The witness directed but little attention to the man he saw behind the tree near the court house steps. The witness walked from the jail to the court house fence with defendant and Owens, but did not hear defendant propose to Owens to pursue defendant just after his escape, nor did he hear Owens, in reply to defendant's question: "Can we catch him?" reply: "If any two men can, we can." Sloan and Owens were not friendly at all times. They alternately quarreled and associated on friendly terms. The witness, several months prior to the killing, heard Sloan say that he could "whip all the Thurmonds, beginning with the sheriff and ending with the defendant." The defendant, who was present, told Sloan to "hush up"; that he, Sloan, did not know who his friends were. The witness never heard the defendant utter a threat against the deceased. Defendant and Sloan associated with each other a great deal, and appeared to be close friends. Sloan was a very quarrelsome man when drunk or drinking. When found, the body of Sloan lay north and south—the head south.

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Henry Ragland testified, for the State, that he was city marshal of Victoria at the time of Lewellen Sloan's death. About ten o'clock on the fatal night, the witness was notified that Sloan was drunk and disorderly. Witness then went to Sitterlee's saloon, and was informed that Sloan had just left and gone to Jecker's saloon. He found defendant at Jecker's saloon, and called on him to help arrest Sloan, who was boisterous and disorderly. This witness's narrative, as to what occurred from the time of Sloan's arrest until his dead body was found, was substantially the same as that of the witness Cahill. Continuing his testimony, the witness said he met the defendant and Owens about the time that Cahill did, and heard both defendant and Owens ask Cahill if Sloan was dead, and, on being assured that he was, replied that Cahill must be joking. He also heard defendant tell Cahill that he was wrong in saying that deceased brought his death on himself, and that he, defendant, had lost his position as deputy sheriff by reason of the deceased burning the papers of the sheriff, and that the sheriff had taken the office keys from him. On one occasion, after the killing, Owens, then drunk, began to tell witness something about the killing, but some person joined them at the time, and that prevented the disclosure—if it was to have been a disclosure. Defendant and deceased spent a large part of their time together on apparently the most friendly terms. Deceased and Owens frequently quarreled, but as often appeared to "make up." Sloan's body lay with the head south and feet north when witness saw it. Witness saw one bullet hole in the head and another in the breast.

E. A. Perrenot testified, for the State, that, at the time of the killing of deceased, he lived in what was known as the King house, which house was separated from the Ashworth place by an open lot. Not long before the shooting on the fatal night, the witness was awakened by the barking of a small dog in his house. Soon afterward he heard a loud halloo which appeared to come from the remote corner of the vacant lot. He then got up, and soon heard the murmur of voices which indicated that two or more persons were going down the street from the direction of Mrs. Borden's house toward that of Klein. Klein's said house was across and down the street from witness's house. When the parties reached a point near Klein's house the witness heard a voice, which he recognized as the voice of deceased, utter the supplication: "Boys, don't do me

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that way." Other voices responded but in a tone too low for witness to understand what was said, or to form an idea as to who were speaking. The witness could only judge that there were more than one person with Sloan, by the fact that Sloan's appeal to the "boys" distinctly addressed the plural. The witness, a few moments later heard Sloan's voice at Jane Davenport's gate. He could not distinguish what was said, but from the tone of the voice was satisfied that Sloan was supplicating or apologizing to some body. A few moments later the witness heard three shots which sounded as if fired about the Barnes corner, which was distant from Jane Davenport's gate the width of the block. There was a short interval between two of the shots, but whether between the first and second or second and third, the witness did not remember. From the witness's house to Jane Davenport's gate the distance was about one hundred yards. It was about one hundred and seventy-five yards from the witness's house to Mrs. Borden's place. From where the witness stood on the gallery to the nearest point in the street passed over by Sloan and the persons with him, the distance was about sixty-five feet. No names were called by any of the parties, so far as the witness heard. He recognized none of the parties except Sloan, and recognized him only by his voice. He did not hear the words: "Don't Al.," uttered at Jane Davenport's gate.

Larkin Moore testified, for the State, that he was at Jane Davenport's house on the night of and at the time of the killing of Sloan. Just before the shots were fired Louis Davenport, Jane's husband, and Solomon Gibson were playing cards, and witness and Jane were sitting near the stove, Jane with her head resting in her hands. Witness heard voices at the Davenport gate a few minutes—perhaps as long as thirty minutes—before the shots were fired. One voice said: "Al., don't!" Witness did not recognize that voice. Jane Davenport remarked to her husband: "That is Al. Daniels, who was here this evening. He is coming back with somebody drunk; don't let him come in." Neither Jane nor her husband got up and went out of the house. It was a cold night, and all the doors and windows of the house were closed. Al. Daniels was a negro commonly called "Al.," who lived in Victoria.

R. L. Owens was the next witness for the State. He testified that he was present and witnessed the killing of the deceased by the defendant on the night of January 3, 1887. The wit-

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ness walked into Sitterlee's saloon early on the said night, at which time a great deal of disorder and confusion was prevailing in said saloon. Witness asked Louis Sitterlee, one of the proprietors, why he did not preserve order. He replied that all of the deputy marshals, including the deceased, were drunk, and that he could not maintain order. He, Sitterlee, then asked the defendant, who was present, if he was not a deputy sheriff. Defendant replied that he was. Sitterlee then requested defendant to preserve order in the saloon. Defendant thereupon summoned witness as a posse, remarking that he did not like to undertake to preserve order without aid. About that time the deceased came to the table where the witness and Woods were playing cards for drinks, and asked the witness if he could not treat. Witness took a drink check from his pocket and replied to deceased: "I can; call for your poison." The drinks were then brought and swallowed, and deceased crossed to the table at which defendant and Felix DuBoise were sitting. He threw his arms around defendant and DuBoise and overturned the table. Defendant seized the table, a small one, held it in a position as though he intended to place it on deceased's head, and said to deceased: "God damn you, boy, behave yourself or you might get hurt." Sloan soon afterward left the saloon. A few minutes later Marshal Ragland came in and inquired for Sloan. On being told that he had gone to Jecker's saloon, Ragland summoned witness to go with him to find Sloan. Witness, defendant and Ragland went at once to Jecker's saloon, where they found Sloan, whom Ragland and defendant arrested, and started with to the court house, followed by the witness and others. Just before the gate of the court house was reached, the witness saw the defendant draw his pistol, and heard him ask Ragland if the calaboose was a safe place in which to confine Sloan. Ragland replied that he did not think it was safe, when defendant proposed to confine him in the jail. Reaching the jail, defendant discovered that he did not have the cell keys, and proposed putting deceased in the sheriff's office until he could send for the keys. Sloan appealed to witness and others present to go on an appearance bond for him in order that he could be released. He was, however, locked in the sheriff's office, and witness, defendant and others went back to Jecker's saloon, where defendant asked witness to write a note to his uncle asking for the keys. The witness wrote two or three notes before he got one to suit the defend-

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ant, which one was despatched by defendant to his uncle, the sheriff, by hands of Luis Garza.

Having despatched the note, the witness and defendant went to Sitterlee's saloon, where, after the lapse of a considerable time, they were told that "the old man"—Sheriff Thurmond—was at the jail. They went at once to the court house, in company with Ragland and Cahill, and found the "old man" storming around, and cursing violently. Witness remained outside the jail, and Ragland, Cahill and defendant went inside. Sheriff Thurmond at once asked them who put that drunk man in his office, and said: "I am ruined. He has burned up important papers that I can't replace." He then turned on defendant and abused him violently for putting Sloan, while drunk, in the office. Sheriff Thurmond finally ordered Sloan "to get out of there." Sloan left the said office in a run, and crossed the court house yard in the direction of the site of the old jail. Soon afterwards Cahill exclaimed: "He is gone," and he and Ragland came out of the jail and looked around for Sloan without finding him. The witness, defendant, Ragland and Cahill then walked off together as far as the court house gate. On reaching the gate the defendant remarked that he was ruined. After passing through the gate, he said to witness: "I've a notion to go and get Sloan; do you think we can get him?" Witness replied: "If any two men can get him, you and I can." Defendant said, "come on," and he and witness left, in pursuit of Sloan. They went from the gate to the northeast corner of the court house square, turned west to Moody street, up Moody street on the east side, to where Perrenot lived, whence they went towards Ashworth's house, the defendant a short distance in advance of witness. About that time the witness discovered a man on horseback near Ashworth's house, and about the same time, or a few moments later, he saw Sloan at or near Mrs. Borden's gate. Defendant, being ahead of witness, crossed the street diagonally to Sloan, seized him with one hand, jerked him around, and snapped a pistol in his face, just as witness reached them. Defendant and witness then started down the street with Sloan. Sloan, who endeavored to keep near witness, asked him what was the matter. Witness replied: "He just snapped his pistol at you." Defendant said: "Yes, God damn you; if it hadn't snapped you would have been in the lowest pit of hell before now!" From near Klein's corner the witness, defendant and Sloan

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crossed the street diagonally to Jane Davenport's gate. Sloan seized the gate, and defendant began to jerk him violently, when witness said to him: "Al., for God's sake, don't do that! We are now near the court house; let's go on and lock him up." When they reached Barnes's corner, Sloan began to struggle, and got between witness and defendant. Witness, fearing defendant would shoot through Sloan and wound or kill him, released Sloan and fell to the ground. Sloan then made two or three quick steps towards the Barnes corner, then turned and ran towards defendant with both hands up, exclaiming: "For God's sake, Al., don't do that!" Defendant extended his pistol to touch Sloan's breast, and fired. Sloan stepped across witness's body and fled towards Mrs. Ashworth's house and Coleman's house, and then came back towards defendant, who fired two more shots in quick succession, and Sloan fell off the sidewalk. Defendant then said to witness: "Come, let's go." The witness replied: "No, by God; you go your way, and I'll go mine." They then separated.

Leaving the defendant at the place of the killing, the witness retraced his way over the route he had come as far as Jane Davenport's corner, where he turned south. He went thence two blocks and turned east, and thence three blocks to Main street, and thence up Main street to Sitterlee's saloon, where he found the defendant, and Houston Thompson, John Stratton, Joe Sitterlee and others. Some person remarked that Sloan had been killed, when witness and defendant both replied: "That can't be true; you are joking." The witness denied that defendant then proposed to go and see if Sloan was dead, and that he refused; denied that defendant repeated his proposition, and that he again refused; or that defendant then said: "Well, as you won't go to see about it, may be you are the man that killed him," and that he replied: "Yes, by God, that is what I am, and (exposing his pistol) this is the thing that did it;" nor did he, witness, then ask the parties present to take a drink. Ragland, Cahill and others were present at the court house gate, and were in a position to hear the defendant say that he was going after Sloan. The witness, at the time of the killing, was not in a position to be seen by any person standing at Olnock's gate, nor could a person at Olnock's gate see a person at Jane Davenport's gate. Witness stated before the coroner's jury that he knew nothing about the killing. He was not sworn when he made that statement, or, if he was,

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he paid no attention to the oath. On his way to the room in which the inquest was being held, the witness met the defendant, who asked him not to attend the inquest. After making his statement before the coroner's jury, the witness hurriedly left, as it looked like "things were getting too warm" for him. Witness had no misunderstanding with Sloan on the night of the killing. Previous to that time he and Sloan had had frequent misunderstandings, but none of a serious nature. At the time of the killing he and Sloan were on friendly terms. The witness denied that some time subsequent to Sloan's death, he told Henry Jones that the defendant did not know anything about the killing of Sloan, and that he, witness, was glad he did not, as he, defendant, and Sloan were good friends. The witness denied that, while taking a drink with Tom Hathaway on the morning after the killing, he told Hathaway, in reply to Hathaway's invitation to go and see Sloan's body, that he "did not want to see the d—d son of a bitch." Sloan did not say in Sitterlee's saloon, on the fatal night, that he could "whip any d—d son of a bitch who voted for Pridham." He said that he could "whip any d—d son of a bitch who voted *against* Pridham." Witness had never been on friendly terms with sheriff Thurmond, and had always opposed the said sheriff in the elections. The witness admitted that he wore his pistol to the inquest upon the body of Sloan, but did so upon the advice of defendant. He denied that, on the morning after the killing, he met Joe Sitterlee on the street and threatened him if he did not "keep his mouth shut." Some time after the killing of Sloan, the witness had a conversation with defendant in which defendant said: "I have killed three or four men, but I gave them all a fair chance, except Sloan; and I hope Sloan is now roasting in hell." Witness had testified in this case three different times, but had never before testified to the above statement made by defendant. He was never asked directly about it, although he was always directed to tell all he knew about the killing. Witness suppressed the truth about the killing of Sloan because he was afraid to tell the truth about it. Witness, on the night of and after the killing, started to relate the facts to Ragland, but the defendant joining them, abandoned the purpose. The witness and Sloan did not quarrel in Sitterlee's saloon on the night of the killing.

Eugene Sloan, the brother of the deceased, testified, for the State, that he last saw deceased alive on the evening of Janu-

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ary 3, 1887, in Sitterlee's saloon. At the time of the killing, the defendant had the deceased's pistol, which he borrowed some months before. On the morning after the deceased was killed, the witness went to the defendant and asked him for his brother's pistol. Defendant said that he could not then surrender it, but that witness could go to Sitterlee's saloon and get his, defendant's, pistol, which deceased had left there. A day or two afterwards witness got deceased's pistol from defendant. That pistol was a weapon of forty-five calibre. Witness had one of the balls taken from the body of the deceased. It was the ball which inflicted the wound in the thigh. That ball not having struck any of the bones, it was not in the least battered. It fitted the deceased's pistol perfectly. Deceased, when killed, had on a "stockman" hat. That hat showed a bullet hole corresponding in location with the bullet hole in the head of deceased. The breast of the deceased's coat was powder-burned. Witness slept at the house of his mother on the fatal night, which house was situated three or four blocks distant from the court house. He did not hear of the killing until next morning.

James Mumford testified, for the State, that he had occasion to pass the court house on the fatal night, and in doing so his attention was attracted by confusion that prevailed in the jail, —the sheriff's voice being particularly distinct. Soon after his attention was first arrested by the noise, the witness observed a man approaching him from the direction of the court house fence. That man passed the witness at a short distance, and spoke to him, witness recognizing him by his voice as the deceased. Deceased then came up to witness, who was on horseback, and asked witness to let him ride behind the witness. Witness cautioned the deceased, who was evidently under the influence of whisky, to be careful about getting too near the horse, and told him that the said horse, being young, wild and unbroken, would not carry double. Deceased then offered witness a drink of whisky from a bottle he had, and remarked: "They jugged me and got my pistol, but didn't get my whisky." Deceased then walked alongside of witness's horse until they got near Mrs. Ashworth's house, when deceased yelled. Witness then quickened the gait of his horse, and got a short distance ahead of deceased, when he observed the approach of two men. Not knowing the two men, but fearing they might be marshals and arrest him as a participant with the deceased

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in disorderly conduct, the witness rode on. One of the men walked up to and seized Sloan, and walked with him back to the other man, who was in the middle of the street between the houses of Mrs. Ashworth and Dr. Sutherland. Witness distinctly heard Sloan say: "I will go with you anywhere." The man who first got with Sloan and seized him did not jerk him round, and snap a pistol in his face, so far as the witness saw. The witness did not see either of the men have a pistol. The three parties, from where witness last saw them, went down the street, and the witness went on home. Witness knew both the defendant and R. L. Owens, but did not recognize either of them as one of the men who arrested Sloan. From the place where the witness last saw the parties he had gone a little further than a block when he heard the shots. While traveling with the witness, Sloan was on his way to his mother's house, and had nearly reached it when he was overtaken by the parties. He was overtaken by those parties at a point near Mrs. Borden's gate.

Jane Davenport was the next witness for the State. She testified that she was at home at the time of the killing of Sloan. Her husband and Solomon Gibson, a few minutes before the killing, were engaged in playing a game of cards, and witness and Larkin Moore were seated at or near a stove, talking, the witness with her head resting on her hands. A few minutes before the shots were fired the witness heard voices of some parties running from the direction of Mrs. Borden's house toward her house.

Presently the fence attached to witness's house was shaken, and a voice said: "Al., don't! Don't, Al." The witness did not recognize the voice, but said to her husband: "Go out and see that Al Daniels does not bring that drunk man in here." Al. Daniels was a negro who, under the influence of liquor, had been at witness's house that evening, and the words spoken induced witness to believe that he had returned. Louis Davenport did not go out of the house. Within a very few minutes thereafter the witness heard three shots fired at or near Byrnes's corner, which was the northeast corner of the block on which witness lived—her house occupying the northwest corner. Just before the shots were fired the witness distinctly heard the words: "Let me say my last prayer." Those words were spoken at or about the place where, a moment later, the shots were fired.

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C. L. Thurmond, Sr., was the next witness for the State. He testified that he was sheriff of Victoria county at the time of the killing of Sloan. On that night he received a note from defendant, his nephew, stating that Sloan, drunk and disorderly, was in his custody, and that, as the calaboose was unsafe, he wanted the jail keys in order to get Sloan in jail. Witness got up and went to the jail. As he approached the jail he heard the smashing of windows in the jail office, and when he got into that office he found that some books and papers had been thrown into the fire and were burning. Witness then directed his energies toward saving such of the books and papers as were not yet entirely consumed, and while thus engaged the defendant, with Cahill, Ragland and others, came to the jail office. Witness, who was enraged about the burning of his books and papers, asked defendant why he had confined a drunk man in his private office, scolded him for doing so, demanded the keys, with the remark that no man with so little discretion could be entrusted with them, and finally told him that he had no further need for his, defendant's, services. While the witness and defendant were stamping out the flames, and thereby creating some confusion, Sloan slipped out, and soon afterwards somebody—witness thought it was Cahill—remarked: "Boys, he's gone." The several parties then left, and witness began to search for a bundle of important papers which pertained to a large land suit, and which he feared was among the papers burned. He found them after a short search, and then closed and locked his office and started home. Reaching the northeast corner of the public square, and remembering that the defendant's note stated that Sloan and all of the marshals were drunk, he concluded to go down town and see if there were any disturbances going on. When he got in front of Jecker's saloon on the south side of the public square, he heard three pistol shots fired. He saw the flashes from the last two shots. He then returned to the court house, where he was soon joined by Ragland and Cahill. Those two parties then went off in the direction of Barnes's corner, and soon one of them hallooed to witness that Sloan was lying in the road, dead. Witness called to them not to touch the body, and immediately went to it himself. The witness and Cahill and Ragland then examined the body and the ground around it for weapons, but found none. Witness then sent for the coroner, who came, viewed the body, had it removed to the court house

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and adjourned the inquest until the next day. The pistol shots, judging from the flashes, were all fired from the same position, and either from the north to the south or the south to the north. There was a short interval between the first and second shots, but not long enough to have enabled a man to run across the street between the two said shots. The second and third shots were fired with a barely perceptible interval of time—just enough to distinguish two shots and to indicate that if fired by one man, they were fired from a self acting pistol. They were fired too near together to have been fired by a man who had to cock the weapon with his hand or thumb. Defendant was generally called Al. Sloan fell with his head pointing south and his feet north.

George Williams testified, for the State, that he was in Sitterlee's saloon on the fatal night, but before the shooting occurred. Sloan was in that saloon, drunk, and was making a Mexican play a guitar and dance. While in that saloon Sloan said that any man who voted for Pridham was a son of a bitch. He afterwards said that any man was a son of a bitch who did not vote for Pridham. Defendant and R. L. Owens, a brother-in-law of Pridham, were in the saloon at the time. The witness got Sloan's pistol away from him and gave it to the bar keeper. He afterwards saw Sloan trying to get a pistol from the defendant.

James Brown was the next witness for the State. He testified that, late one evening either in November or December following the killing of Sloan, he went to Sitterlee's saloon in the town of Victoria, in front of which saloon he found the defendant abusing R. L. Owens. Witness got Owens and took him down the street to Heaton's store, and then returned to the defendant, with whom he walked as far as the corner of Main street. On that walk witness asked defendant: "Why were you abusing Owens? In a little while more you would have hurt him." Defendant replied: "No, I do not want to hurt the cowardly son of a bitch. On the night of the shooting he fainted and fell over, and I had it all to do." This meeting and conversation occurred subsequent to the indictment of defendant for the murder of Sloan, and while he was on bail. The witness and the defendant were not on friendly terms. They had had two difficulties, in one of which they exchanged shots. The first of those difficulties occurred some time before the defendant made the above statement to witness, and prior to the

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previous trial of this defendant, which occurred in June, 1888, and at which trial the witness testified. On that trial the witness testified that he did not have a pistol on his person at the time of the said difficulty with defendant in Sitterlee's saloon, which said testimony was not true, as he did have on a pistol that night. He did not know why he testified on the defendant's former trial that he was not armed at the time of the said difficulty with defendant. The second difficulty between witness and defendant in which they exchanged shots likewise occurred prior to the trial in June, 1888, of the defendant. Witness was friendly with both defendant and Owens in November and December, 1887, and interposed in their said quarrel to keep down trouble. Witness was on good terms with Owens, but could not be said so be on particularly friendly terms with him. He did not associate with Owens to any great extent; did not like to be seen with him, and as a rule avoided him as much as possible. The witness never told anybody about what defendant said to him after abusing Owens as stated, except R. L. Owens, F. R. Pridham and John Powers, and he charged each of them not to repeat it, as he did not want to appear as a witness in this case.

The State rested.

The defense recalled T. A. Cahill as its first witness. He testified that he was one of the jury of inquest which sat upon the body of Sloan. R. L. Owens testified before that inquest that he knew nothing whatever about the killing of Sloan. The witness was a member of the party which accompanied defendant and Ragland to the jail with Sloan on the fatal night. If, at the court house gate, en route to that jail, the defendant drew his pistol at that time and place, he, witness, would have seen it. Defendant did not draw his pistol at any time or place while he and Ragland had Sloan in custody and were taking him to jail. If at the court house yard gate the defendant proposed to Owens to follow and catch Sloan, and Owens replied, "If any two men can catch him we can," the witness did not hear it. The witness did not see defendant and Owens leave the court house fence to overtake Sloan. It was his impression that defendant and Owens followed him, witness, and Ragland to town. When witness last saw defendant and Owens before the killing, they were standing at the court house gate with Luis Garza. The witness knew Jane Davenport, and knew her reputation for truth and veracity. It was infamous, and she

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was totally unworthy of belief under oath. Ex-county judge of Victoria county, Coleman, corroborated the testimony of Cahill as to the reputation for truth and veracity of Jane Davenport.

Ed Sitterlee was the next witness for the defense. He testified that he was one of the proprietors of Sitterlee's saloon, in Victoria, Texas. The witness was up stairs over his saloon during the earlier part of the fatal night. He was notified that a disturbance was being created in his saloon, and soon afterward went down stairs. Sloan had then left, but parties present, including R. L. Owens, gave witness an account of his recent conduct. The witness then sent word to Ragland that Sloan was drunk and disorderly. He then went behind the bar and was looking under it, when Owens came to him and said: "Are you looking for a pistol? If you are, here is mine; take it." Ragland soon reached the witness's saloon, and he and the defendant left together. They had been gone but a few minutes when the witness walked to the corner of the street, from which point he saw Ragland and defendant taking Sloan from Jecker's saloon toward the calaboose in the court house yard. Witness followed them and saw all that occurred from that time until Sloan was put into the sheriff's office. He did not see the defendant draw a pistol at any time or place between Jecker's saloon and the sheriff's office. When they reached the sheriff's office Sloan appealed several times to witness and others to become bail for his appearance next day, in order that he might not be put in jail. The witness had known the defendant and Sloan for years, during all of which time they associated closely and appeared to be particularly intimate friends. The witness had also known R. L. Owens for several years, and he knew that, at times, at least, the said Owens and Sloan were not on good terms. He knew personally of several quarrels between them. The witness knew the State's witness James Brown, and knew that he and the defendant were not on friendly terms. He did not think they had been friendly since their first difficulty, of which Brown testified. Witness also knew Jane Davenport, whose reputation for truth and veracity he knew to be so bad that she was not entitled to credit on oath.

Louis Sitterlee testified, for the defense, that he was one of the proprietors of Sitterlee's saloon in Victoria, and was in his saloon on the night of the killing. Sloan was in that saloon

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conducting himself in a disorderly manner, when witness asked defendant to preserve order. During the evening Sloan and Felix DuBoise got to scuffling in the billiard room and overturned a table. The witness saw both difficulties between the defendant and the State's witness Brown, about which Brown testified. During the first quarrel referred to, defendant, who was standing at the end of witness's counter, said something about having his thumb greased. Brown, pulling up his vest and exposing a pistol in the waistband of his pants, replied: "I would like to see the color of the man's hair who can get there quicker than I can." Somebody present pushed Brown out of the door, when defendant handed witness his pistol, remarking: "I don't want a fuss; put my pistol away." At the next difficulty between defendant and Brown, shots were exchanged, defendant shooting from the inside and Brown from the outside of the saloon. The witness knew that defendant and Sloan were friends, but knew nothing about the personal feeling between Owens and Sloan.

Ed. Hathaway testified, for the defense, that one evening, a few days prior to the killing of Sloan, he and Sloan took a seat in a door at Schwartz's corner. Owens passed without speaking while they were sitting there, and Sloan remarked: "Owens is the only enemy I have in Victoria, and I am afraid that he and I will have trouble some time." The witness had often before heard Sloan speak of Owens being at enmity with him, and he had often heard him, Sloan, speak of the friendship existing between himself and the defendant.

Tom Hathaway testified, for the defense, that he met R. L. Owens on the streets of Victoria, between six and seven o'clock, on the morning after the killing, and went with him to a saloon to get a drink. While standing at the bar the witness, who had just heard of the killing, proposed to Owens to go and see Sloan's body. Owens replied: "I don't want to see the damned son of-a-bitch."

George Williams testified, for the defense, that while he was in Sitterlee's saloon on the fatal night he heard Owens and Sloan at the bar counter, quarreling. They appeared to be quarreling about the spilling of some whisky. Owens said to Sloan: "It was a damned dirty trick," or "you did me a damned dirty trick"—the witness was not certain which. Owens made some other angry remarks, which witness could not now recall.

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Henry Ragland was recalled by the defense, and testified that, judging by their close association, he considered the defendant and Sloan, up to and including the time he last saw them together, to be good friends. The feeling between Owens and Sloan, to judge from appearances, was alternately good and bad. They had several quarrels to the personal knowledge of the witness. Owens testified, under oath, before the coroner's jury, that he knew nothing whatever about the killing of Sloan. He repeated that declaration under cross examination by the jurors.

Joe Sitterlee testified, for the defense, that he and John Stratton were in Sitterlee's saloon, playing billiards, on the fatal night, when somebody came into the saloon and reported the killing of Sloan. Defendant, Owens and others were present. Somebody remarked: "It can't be true that Sloan is dead." Defendant then proposed to Owens: "Let's go and see if it is true." Owens refused to go. Defendant repeated his proposition, and Owens again refused, when defendant remarked to him, Owens: "Since you refuse to go and see about it, perhaps you are the man who killed him." Owens replied: "By God, that's what I am; and (exposing his pistol) here is the thing that did it." He, Owens, then staggered to the bar, and called the crowd to drink with him. Speaking to witness, Mr. Stratton said: "Let's get out of here," and he and witness left. Meeting Owens on the next morning, Owens said to witness: "You had better keep your mouth shut. Some cases are yet standing against you, and me and my friends can break your neck." Stratton corroborated this witness as to the conversation between defendant and Owens in the saloon.

Henry Jones testified, for the defense, that soon after the killing of Sloan, and before the indictment of the defendant, he met Owens in a saloon in Victoria, and said to him: "Lee (Owens), some people seem to think that Al. Thurmond had something to do with, or knows something about, the killing of Sloan." Owens replied: "No, Al. knows nothing about it, and I am damned glad he doesn't, as he and Sloan were friends."

Allen Nelson testified, for the defense, that, on the evening of the Sunday preceding the killing of Sloan, the said Sloan, witness and defendant were sitting together on the court house steps. Owens's name was mentioned, when Sloan remarked: "I have heard that Owens has said that the next time I get

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drunk and make a play at him he will take me in. I am on a spree now, and I believe I will go down and tackle him and see if he will take me in." Defendant said to Sloan: "You had better let Owens alone; he might fool you." Sloan replied: "He is not quick enough," and went down the street. The witness knew as a matter of fact that defendant and deceased were on particularly friendly terms.

C. L. Thurmond, Jr., testified, for the defense, that he was the son of the sheriff of Victoria county, and was himself a deputy sheriff of that county, and held that position during the time the defendant was confined in jail on the charge of killing Sloan. A day or two after the arrest of the defendant, the State's witness James Brown came to the jail and requested an interview with defendant. Witness told defendant that Brown wanted to see him, and advised him to have nothing to say to or do with Brown, as he did not think Brown was friendly to him. Defendant replied that he did not want Brown admitted unless accompanied by a sheriff or deputy sheriff. Brown never afterward called at the jail to see defendant.

Dick Klamberg testified, for the defense, that he saw the officers taking Sloan to jail on the fatal night, and a half or three-quarters of an hour later saw the defendant standing on Schwartz's corner. Nobody was then with defendant. Witness knew as a matter of fact that defendant and the State's witness Brown were not friends, and had not been friendly since their first difficulty in Sitterlee's saloon. The State's witness Brown and Owens were good friends, so far as appearances go. They associated with each other a great deal, and the witness had often seen Brown go to the store of Owens's brother, hunting Owens. Brown always appeared to witness to hunt for Owens as an associate, and never to avoid him.

Kate Coleman testified, for the defense, that on the night of and a short while before the killing, Sloan came to her house and asked for Judge Coleman. He said that he had just escaped from jail and wanted protection; that Owens and another man, whom he did not name, were after him, and he was afraid they would kill him. Witness tried to get him to bed in her house, but he refused to go into the house, and left, saying he was going home to see his mother. During the time that witness and Sloan were talking at the gate, a man, whom the witness distinctly recognized as R. L. Owens, passed rapidly on the opposite side of the street. When Owens reached Silas's corner

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Sloan left the witness in a run toward Barnes's corner. Witness then went into the house, and had taken off her shoes, laid down and covered up when she heard the shooting. The witness testified on the examining trial of Owens, but did not state on that trial that in the man who passed her house on the opposite side of the street she recognized Owens, because she was not asked if she recognized the man. When witness last saw Sloan he was at or near Barnes's corner, in a run. Barnes's said corner was distant from witness's house the length of a block and the width of a street. The Olnock house was across the street from the Barnes corner.

Gus Albrecht testified, for the defense, that he was an eye witness to the killing of Sloan, viewing it from Mrs. Olnock's gate, which was across the street, northwest from the northwest corner of the public square. The witness had been standing at that gate fifteen or twenty minutes when he saw Sloan running towards the Barnes corner from the direction of Kate Coleman's house. About the same time he saw R. L. Owens approaching the Barnes corner from the direction of Jane Davenport's house. Owens and Sloan met at the Barnes corner, when Owens said to Sloan: "By God, I have got you now!" and drew a pistol from his overcoat pocket. Sloan said: "I know, Mr. Owens, that you are going to kill me, but for God's sake let me say my last prayer." The words had scarcely passed Sloan's lips when Owens fired. Sloan fell, and Owens in a very few moments fired two more shots into the prostrate body, and left, going back over the route he had come. The defendant was not present at the killing, nor was any other person present or near, that the witness saw. The distance intervening between the witness and Owens and Sloan at the time of the shooting was the width of the street. The witness knew Owens well, and recognized him by the outline of his figure, his voice and, at the flashes of the pistol, by sight. He had, however, recognized him before he reached the corner. The moon, although occasionally obscured by floating clouds, was shining.

Continuing his testimony this witness said that he was at Mrs. Olnock's gate to meet a negro girl with whom, earlier in the night, he had made an appointment. Immediately after the shooting the witness went home over a route the meanders of which he detailed. It was then a little after eleven o'clock. He fixed the hour by the fact that, while standing at

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Mrs. Olnock's gate he heard her clock strike eleven. The witness went to bed immediately, on reaching home, sleeping with his brother. He did not go to town on the day following the killing, but went on the day succeeding that, and met Joe Sitterlee on the street, to whom he divulged the circumstances of the killing. Joe Sitterlee then called deputy sheriff C L. Thurmond, Jr., who went with witness to a magistrate, where a complaint charging Owens with the murder of Sloan was filed. The witness was at Buck Bates's house about nine o'clock that night, but remained a short time only. From Bates's house he started to the railroad section house, about two miles north of town, and was on his way to the section house when he met the negro girl and arranged to meet her at Mrs. Olnock's gate and go home with her. It was not true that witness slept at Bates's house, with George Bates, on the night of the killing, and was in bed with George Bates when the shots were fired. and was awakened by George Bates and asked by him if he heard the shooting. It was about nine o'clock when witness left Bates's house, and it was about half-past twelve when he got home. He did not, on reaching home, tell either his brother or mother about seeing Owens kill Sloan. He got up next morning and ate breakfast with his mother and brother, but did not go to town on that day. When Sloan fell, his head lay east. Owens then, without changing position, fired two more shots.

The defense rested.

George Bates was the first witness called by the State in rebuttal. He testified that he lived at the house of his aunt, Ann Bates, between a half and three quarters of a mile distant from the Barnes corner where Sloan was killed. Gus Albrecht slept with the witness in the house of the said Ann Bates all night, of the fatal night. He came to the house between seven and eight o'clock, remained all night and left between seven and eight on the next morning. The shots which killed Sloan aroused the witness, and he waked Albrecht and asked him if he heard the shooting. Witness heard other shots on that night, but paid no attention to them.

Jake Wertheimer, Ed Sitterlee, Louis Sitterlee, Ragland and Cahill, as impeaching witnesses for the State, testified that the reputations of Gus Albrecht and Kate Coleman, for truth and veracity, in the neighborhood of their residence, were bad.

John Power, Buck Power and Dave Emerson were then called by the State as witnesses to support the reputation, for

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truth and veracity, of the State witness James Brown. The predicate established by these witnesses is the subject matter of the ruling of this court as announced in the second head note of this report. They testified that they lived in the Mission Valley neighborhood in DeWitt county, and that, for several years, until about eighteen months before this trial, James Brown lived in the said neighborhood, during which time they knew him well. During his said residence in the Mission Valley neighborhood, the reputation for truth and veracity of the said witness Brown was above reproach. They did not know what reputation in this respect the said witness has borne in Victoria county during the eighteen months of his residence in that county. Emerson further testified that he and R. L. Owens slept together at Owens's father's house on the night of the killing. When witness got up for breakfast about eight o'clock he waked Owens, but Owens did not get up. The State closed.

Mrs. Albrecht and Valentine, the brother of the defense witness Gus Albrecht, testified, for the defense, in the most positive and circumstantial manner, that the said Gus Albrecht came to his said mother's house between twelve and one o'clock on the fatal night, and went to bed and slept with Valentine Albrecht throughout the said night.

John Harris testified, for the defense, that he passed Barnes's corner about eleven o'clock on the night Sloan was killed, and in passing the said corner saw Gus Albrecht standing at Mrs. Olnock's gate. When he reached the east side of the court house square the witness met the negro girl Harriet Johnson, who asked him if he knew where Gus Albrecht was. Witness told her that Gus was then standing at Mrs. Olnock's gate. He then went to Jecker's saloon, and had about reached that saloon when he heard three shots fired at or near the Barnes corner.

The charge of the court referred to in the sixth head note of this report reads as follows: "III. If the jury believe from the evidence that the deceased was unlawfully killed by the defendant, as charged in the indictment, and that the witness Lee Owens was present, and, knowing the unlawful intent of the defendant, did aid by act, or encourage by word or gesture the defendant in the commission of the offense; or, if they believe that the deceased was unlawfully killed, as charged, by the defendant, and that the witness Owens, knowing that the

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defendant had committed the offense, did in any manner aid the defendant to escape arrest or trial—in either case the testimony of Owens will not be sufficient to justify the jury in convicting the defendant, unless the jury believe that the testimony of said witness is corroborated by other evidence of some material fact or facts tending to convict (connect?) the defendant with the commission of that offense; and the corroboration is not sufficient if it only shows that the offense has been committed; but, to be sufficient, the corroborative evidence must tend to connect the accused with the commission of the offense. This rule of law, however, does not require that the corroboration itself, disconnected with the testimony corroborated, shall establish the guilt of the accused."

A. S. Thurmond filed an able and elaborate brief and argument for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for murder in the second degree, with fifteen years imprisonment in the penitentiary assessed as punishment.

The indictment was presented in the district court of Victoria county. That court, of its own motion, sent the case to De Witt county. After this order was made, but on the same day, appellant moved to vacate it, and requested the court to send the case to some other county, upon the ground that there existed in De Witt county a combination of influential persons against him, etc. This motion was overruled and appellant excepted.

In this there was no error. The change of venue being made by the court on its own motion, and not at the request of the appellant, when the cause was called for trial in De Witt county, if there existed any ground for a change of venue from that county, appellant could bring it forward; he was not deprived of this right by the order made in the first instance.

The witness Brown testified to confessions of appellant. The State introduced several witnesses who swore that his reputation was good. Appellant objected on the ground that the witnesses did not qualify themselves to speak to his reputation, etc. The facts were that the sustaining witnesses for years lived in the same neighborhood with Brown, and so lived until

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eighteen months before the trial, at which time Brown moved to Victoria. Under these facts the witnesses were competent to speak to the reputation of Brown, notwithstanding he had moved out of their neighborhood and had been in Victoria for eighteen months.

We also hold that Wertheimer, Ed Sitterlee, Cahill, and Louis Sitterlee show themselves competent to speak to the character of Albrecht.

Appellant's sixth assignment is: "That the court erred in failing to instruct the jury upon the law governing impeaching testimony." We do not think, unless it be under extraordinary or peculiar circumstances, that it would be necessary or even proper for the court to charge the jury upon this matter. Such a rule was announced in Henderson's case, 1 Texas Court of Appeals, 432, but the rule has never been enforced indiscriminately, and its correctness as a general one is, to say the least of it, questioned in Rider's case, 26 Texas Court Appeals, 334.

The witness Albrecht swore that he saw the killing; that Owens, and not appellant, shot and killed deceased, and that appellant was not present when the killing occurred. The State proved by several witnesses that Albrecht's character for truth was bad. Appellant offered to prove that, on the examining trial and at other times, he swore to the same facts. Objection by the State was sustained, and defendant reserved his bill. In this there was no error. (1 Whart. Ev., 570, 571.) Williams v. The State, 24 Texas Court of Appeals, 637, is not in point.

The eighth assignment is that the court erred in failing to instruct the jury that, if they believed that Owens killed deceased, or if they had a reasonable doubt whether or not Owens killed deceased, they should acquit defendant. The cases cited in support of this proposition are not in point, except Black v. The State, 1 Texas Court of Appeals, 368, and in that case the charge was requested and refused. In King v. The State, 9 Texas Court of Appeals, 515, it is held that if the reasonable doubt is applied to the whole case, that will suffice.

Ninth assignment: "The court erred in failing to charge all the law relating to the necessity of corroborating a witness who was an accomplice." The court's charge upon this subject was full, correct and applicable.

The tenth assignment is that the court erred in charging the jury "that they might convict defendant if they believed from

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the evidence that the witness Owens killed deceased, and that defendant was present, and, knowing the unlawful intent of Owens, did aid him by act or encourage him by word or gesture in the commission of the offense." The objections to this charge are, first, that there is no allegation by the State of this state of facts. Answer to this: None were required. Second. That there was no evidence warranting this charge. Answer: There were cogent facts demanding this charge.

Eleventh assignment: "The court erred in refusing to give the following at the request of defendant: 'You are further instructed that, if you believe from the evidence that the witness Owens was testifying to save himself from punishment or moral obliquy of guilt, then his testimony can not be convicted upon, unless corroborated as the evidence of an accomplice.'"

There was no error in refusing this charge. In fact, the charge of the court is correct in every particular, being a clear and pertinent application of the law to every phase of the case.

There was no error in overruling the motion for new trial. The witness Owens was very strongly corroborated by the attending circumstances, as well as by the testimony of several witnesses to distinct facts, quite corroborative in their character.

We have found no error in the matters complained of by appellant, nor any other for which the judgment should be reversed, and it is affirmed.

Affirmed.

Opinion delivered March 16, 1889.

27a 372
27a 404
27 372
30 537

No. 2730.

JUAN TREVINIO *v.* THE STATE.

1. INDICTMENT—GRAND JURY—PRACTICE.—The defendant's motion to set aside the indictment was based upon the statutory ground that a person not authorized by law was present when the grand jury deliberated and voted upon the accusation against him. It appears by the defendant's bill of exceptions that the grand jury for the term was duly organized on December 3, and that it was discharged for the term

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on December 13; that soon afterward the court took a recess, and, upon reconvening after the recess, ordered the sheriff to reassemble the sixteen persons selected originally by the jury commissioners at the June term to serve at the said December term, viz., the twelve who had been impaneled and the four who had not. Of the sixteen thus summoned, the twelve who had, and one W., who had not, been impaneled reassembled, when one of the said twelve was excused by the court, and the said W. was placed upon the panel in his stead. The contention of the defense is that the trial court had no power to excuse the grand juror after he had been duly impaneled; that the status of the excused person as a legal grand juror was not affected by the action of the court, and that the legal effect of impaneling the substituted juror, W., was to create an unconstitutional grand jury of thirteen persons; and that the presence in the grand jury room of the said W. was the presence of "a person not authorized by law." *Held*, that the motion to set aside the indictment was properly overruled, and that the action of the court was correct, as conforming to article 391, of the Code of Criminal Procedure, which provides as follows: "When a grand jury has been discharged by the court for the term, it may be reassembled by the court at any time during the term, and in case of failure of one or more of the members to reassemble, the court may complete the panel by impaneling other qualified persons in their stead, in accordance with the rules prescribed in this chapter for completing the grand jury in the first instance." See the opinion in extenso for an elucidation of the question.

2. ASSAULT TO MURDER—EVIDENCE—INTENT.—An assault and a specific intent to murder are two elements which must concur in order to constitute the offense of assault with intent to murder. The intent must be established as an inference of fact to the satisfaction of the jury, but the jury may draw that inference, as they draw all others, from any fact in evidence which to their minds fairly proves its existence.

3. SAME—PRESUMPTION—FACT CASE.—If the assault is voluntary, is committed with deliberate design, and with an instrument capable of producing death, and there are no extenuating circumstances, it is an assault with intent to murder. And "whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent." See the statement of the case for evidence *held* sufficient to support a conviction for assault with intent to murder.

APPEAL from the District Court of DeWitt. Tried below before the Hon. H. C. Pleasants.

The conviction in this case was for an assault with intent to murder Lorenzo Hernandez, in DeWitt county, Texas, on the eighteenth day of January, 1889. The penalty assessed against the appellant was a term of three years in the penitentiary.

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Statement of the case.

Lorenzo Hernandez was the first witness for the State. He testified that on the day alleged in the indictment, while he, Tulerio Trendez and Blas Martinez were standing at the corner of Keller's store in Cuero, DeWitt county, they were joined by the defendant, who asked Tulerio about getting some work. Tulerio told him of some parties who were building a brick house in town, and paying their hands a dollar and a half per day, and of some other parties with a contract to furnish wood, who were paying woodchoppers a dollar and a quarter per day. The defendant replied that he would not work for as little as a dollar and a half a day, which was too cheap, and remarked: "I have heard that there are some Mexicans who have been cutting wood for seventy-five cents a day." Witness then asked defendant: "Do you mean that remark for me? If you do, why don't you come out and say so like a man?" Defendant, with an oath, replied: "I can say that to twenty men like you. If you don't like what I have said, just follow me and we will settle it." Defendant then walked off towards the railroad crossing, and the witness followed him at a distance of about six or eight steps behind. Maintaining this distance apart, the defendant and the witness crossed the railroad, and turned down it, at right angles towards Buchel's gin. When they reached a point about one hundred yards beyond the railroad track, and nearly opposite the gin, neither having uttered a word, the defendant drew a knife from under his coat, with which he made several thrusts at the witness. The witness retreated rapidly, facing defendant, to a point about ten steps from where the first thrust was made, when the defendant reached and stabbed the witness in the right side. The witness fell into a small hollow or depression in the ground, which was full of mud. Defendant struck two or three more blows at him with the knife, but witness kept him off by kicking at him with his feet. Finally the defendant stepped back a step or two from the hollow, and looked at witness as he lay on his back. The witness then attempted to get up, when the defendant turned and walked off. The witness, when he regained his feet after the affray, saw no person near the scene of action. No person attempted to interfere in the fight, and not a word was spoken to defendant by any body while the fight lasted. After the last thrust at witness by the defendant, the witness told defendant that he had enough. Defendant thereupon made no other effort to cut or stab witness, but put his knife

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Statement of the case.

back under his coat, stepped back and looked at witness who was still lying in the hollow. The wound inflicted upon the witness by the defendant was a severe one. The knife struck him in the left side and made a cut across a rib, about an inch and a half wide. If the defendant was drunk or drinking at the time of the trouble, witness did not observe it. Witness had seen the defendant but two or three times before the affray. He was unarmed and did not follow the defendant to fight, but to hear what further the defendant had to say to him.

Tulerio Trendez and Blas Martinez testified for the State substantially as did Hernandez, as to what occurred at the corner of the street near Keller's store. Neither of them followed the parties to the place where the cutting occurred, and could tell nothing about it.

Amison testified for the State that he witnessed the affray between the defendant and Hernandez from a wagon at Buchel's gin. The men were struggling with each other when witness first observed them. Defendant had Hernandez by the back of the neck, pushing him. Just about the time the witness caught sight of the parties defendant stabbed Hernandez with a knife. They were then in a little depression or hollow in the ground. As soon as he stabbed Hernandez, who fell, the defendant stepped out of the hollow, and looked at him for a very few moments. He then wiped his knife on his coat tail and put it away under his coat. Defendant struck but one blow at Hernandez that the witness saw. Hernandez, while on his back in the hollow, so far as witness saw, did not kick at the defendant with his feet, nor strike at him with his hands. When Hernandez got up he trotted off towards the railroad crossing, went across the railroad and back towards town. When he had gone ten or twelve steps, defendant started after him in a brisk trot, and followed him across the railroad. After crossing the railroad the defendant ran down the cut parallel with the track, a short distance, and then stopped and stuck his knife into the ground—the witness following him at a short distance in his wagon. Defendant then went a little further down the railroad, recrossed the track, and went into a house in the yard in the rear of Hausmann's saloon. He left the knife sticking in the ground. Nobody interferred in the fight between defendant and Hernandez. The witness saw but one blow given by defendant, and from the positions of the parties that blow could have taken effect in Hernandez's right side, but

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not in his left. Witness notified Sheriff Breeden, and pointed out to him the knife and the defendant.

Sheriff Breeden testified, for the State, that Amison reported to him the fight between defendant and Hernandez, and led him to a point near the railroad and pointed out to him a knife sticking in the ground. That knife was a deadly weapon, being a butcher knife, sharpened at the point, and, including the handle, about a foot long. Amison then conducted witness to a small restaurant in the rear of Hausmann's saloon, and pointed out the defendant as the man who stabbed Hernandez, and witness arrested him.

V. B. Proctor, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. A motion was made by defendant to set aside the indictment because a person not authorized by law was present when the grand jury were deliberating and voting upon the accusation against the defendant. This motion presented one of the two statutory grounds for which alone under our practice an indictment can be set aside. (Code Crim. Proc., art. 523; Willson's Crim. Stats., sec. 2119.) The facts, as shown by defendant's bill of exceptions, upon which this motion was predicated, are substantially as follows:

The grand jury for the term was duly organized on the third day of December. On the thirteenth of December, they having informed the court that they had completed their labors, the court discharged them for the remainder of said term. Shortly afterward the court took a recess for perhaps a month. Upon reconvening at the expiration of its recess, the court was advised that during its recess or adjournment several parties had been arrested for felonies, who had not been indicted and who were unable to give bond. Upon this information the court ordered the sheriff to summon the sixteen persons selected originally by the jury commissioners at the previous June term for the said December term—the four who had not been impaneled on the third of December as well as the twelve who had been, and who had acted up to the time they were discharged on the thirteenth, as aforesaid. In obedience to the summons thirteen of the original sixteen appeared and answered to their names; that is, the entire twelve who composed

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the original panel when discharged, and one Wofford, who had been one of the sixteen selected by the jury commissioners at the June term. All arrested parties, including defendant, were brought into court and afforded an opportunity for interposing challenges to the jury, as proposed to be organized, but no challenges were interposed. Lorance, one of the grand jury as originally impaneled and previously discharged, asked to be excused from the panel on account of sickness of his family, and the court excused him, and the man Wofford was retained—substituted in his place—to make out the panel of twelve men, and was, with the other eleven of the old grand jury, sworn and impaneled, and, as one of the grand jury, voted upon, found and presented the bill of indictment in this case.

It is insisted in substance that the court, under the circumstances, had no authority to excuse Lorance, he being one of the jury as originally impaneled for the term; that, the action of the court being without authority and void, Lorance was, notwithstanding said action, still a legal member of the jury; and that the swearing and impaneling of Wofford in his stead was in legal effect the placing and impaneling of thirteen instead of twelve men, the *maximum* constitutional and statutory number allowed for a grand jury; that, such being the case, Wofford was a person not authorized by law to be present when the indictment was found; and that, if the court's action gave him any authority, or constituted him one of the grand jury, then that body, being composed of thirteen men, was an illegal body and any indictment found by it was absolutely void.

If the grand jury was in fact composed of thirteen men under the facts stated, then there can be no question that the indictment would be void. (Lott v. The State, 18 Texas Ct. App., 627; McNeese v. The State, 19 Texas Ct. App., 48.) Nor can there be any question that, after a grand jury is once impaneled, it is beyond the authority and province of the court to excuse or discharge one of its members so as to relieve him from his obligations and duties as such, and that any attempted discharge by the court, until the discharge is final for the term, would be a nullity and void, leaving the juror, in legal effect, still one of the grand jury. (Smith v. The State, 19 Texas Ct. App., 95.) The power to discharge during the term, or before a final discharge of the body after completion of their labors,

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is not vested either in the court or the grand jury, and in fact no such power exists anywhere by authority of law. (Watts v. The State, 22 Texas Ct. App., 572; Drake v. The State, 25 Texas Ct. App., 293; Jackson v. The State, Id., 314; Woods v. The State, 26 Texas Ct. App., 490.)

But all these rules apply alone to a grand jury whose personnel is fixed by its being organized and impaneled, and during the existence and continuance of such organization. After a grand jury has completed its labors and as a body has been discharged for the term by the court, as a body it ceases to exist, and its autonomy and personnel are in a measure, if not completely, changed and destroyed when it is sought to reassemble them. Our statute upon the subject is that, "when a grand jury has been discharged by the court for the term it may be reassembled by the court at any time during the term, and in case of failure of one or more of the members to reassemble, the court may complete the panel by impaneling other qualified persons in their stead, in accordance with the rules prescribed in this chapter for completing the grand jury in the first instance." (Code Crim. Proc., art. 391.)

We think it clear from the phraseology of this statute that it was within the contemplation and intention of the legislature that when the grand jury were reassembled they could only be reorganized and impaneled with twelve men; that there must be at least that many present; that no less number would suffice, and that, if there were not twelve present, the number should be completed by impaneling other qualified persons to make up the deficiency to twelve. If this were not the intention, and they intended the original personnel to control, it is evident that they would have provided that any nine of the original body who appeared could be entrusted with the duty of transacting the business for which they were reassembled, as is provided in article 390, Code of Criminal Procedure. We think it equally clear that when less than twelve appear it is made the duty of the court to fill up the deficiency, if practicable, out of the sixteen originally selected by the jury commissioners. (Art. 357, Code Crim. Proc.)

We think it equally apparent that, when the jury are reassembled after having once been discharged, they must be again "impaneled"; that is, tested as to qualification and sworn again. (Code Crim. Proc., art 379.) If so, then the jury is in effect a new one entirely.

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If upon the reassembling twelve are requisite, and twelve appear, can the judge excuse, for good cause, one of the number and take another of the original sixteen in his place? There is no question but that, if the juror had stayed away, the court would have had the power. Does the fact that he came to court to render his excuse deprive the court of the authority to excuse him and place a new man in his stead? He had not been sworn anew and impaneled it must be remembered, and we will concede that the court might and could have impaneled him with the other eleven and left him to settle his excuses with the foreman and his fellows of the grand jury, who could and would doubtless have relieved him. Suppose the juror had appeared and had been insane, will any one for a moment doubt but that the court not only had the right, but that it would have been its duty, to excuse and stand him aside and put another in his place? Before the grand jury had originally been organized and impaneled would any one doubt that the court could have excused the juror on account of serious sickness of his family? We think not.

If the intention of the statute is that twelve men must be reorganized at the reassembly, what would be the use or the common sense in taking as one of the members a person who could not act and who would not act because of a good and sufficient reason why he should be excused from acting? Would the court do right and be carrying out the intention of the Legislature to impanel such a party? We think not. The law never requires a useless or unnecessary thing to be done. If the excuse of the juror was a sufficient one, it would have been useless for the court to have impaneled him, knowing that he would be excused and would not act nor be called upon to act by the grand jury in the matter before them. To the extent which the court had the power to hear and grant excuses in the first instance, it was authorized to act in the second; and we think the power was exercised in this second legitimately, and in conformity with the spirit and intention of article 391, Code of Criminal Procedure.

The court did not err in refusing to set aside the indictment for the grounds specified. Otherwise the indictment is not objected to, and is amply sufficient to charge assault with intent to murder.

But it is most urgently insisted that the evidence is wholly insufficient to support the verdict and judgment finding appel-

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lant guilty of assault with intent to murder. It is contended that the specific offense of intent to murder is not only not shown, but is disproved by the facts, because, as claimed, appellant was armed with a deadly weapon with which he stabbed the injured party, it is true, but without killing him; that he could have killed him, but he did not do so; on the contrary, that he discontinued and ceased his assault of his own motion after having inflicted the single blow with his deadly weapon.

In assaults with intent to murder, the specific intent to kill is the essential element, and it must be proven to the satisfaction of the jury. "Two things must concur, an assault and a specific intent to kill. Without the simultaneous concurrence of these two constituent elements there can be no assault with intent to murder." (Willson's Crim. Stats., secs. 857–859; McCollough v. The State, 24 Texas Ct. App., 128; Moore et al. v. The State, 26 Texas Ct. App., 322.)

"The intent to kill must undoubtedly be established as an inference of fact, to the satisfaction of the jury; but they may draw that inference, as they draw all other inferences, from any fact in evidence which to their minds fairly proves its existence. Intentions can only be proved by acts, as juries can not look into the breast of the criminal." (People v. Scott, 6 Mich., 287–296; 1 Bish. Crim. Law, 7 ed., sec. 735.)

If the assault is voluntary, committed with deliberate design, and with an instrument capable of producing death, and there are no extenuating circumstances, it is an assault with intent to murder. (Yanez v. The State, 20 Texas, 656.) And "whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent." (Penal Code, art. 502.) We are of opinion the evidence in this case is amply sufficient to support the verdict and judgment. Having found no reversible error in the record, the judgment is affirmed.

Affirmed.

Opinion delivered March 16, 1889.

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Syllabus.

No. 2721.

J. J. WILKS v. THE STATE.

1. PRACTICE—DISQUALIFICATION OF A DISTRICT JUDGE.—A judge is disqualified to preside at the trial of a criminal case wherein he has been of counsel either for the State or the accused.

2. SAME—DISTRICT AND COUNTY ATTORNEY.—The county attorney of each county in a judicial district, except the county in which the district attorney resides, is expressly required by law to attend the terms of the county and other inferior courts of his county, and therein to represent the State in all criminal cases under prosecution or examination. The district attorney is not required to aid or assist the county attorney in such prosecutions, and the mere fact that a prosecution carried on by the county attorney may eventuate in the return of an indictment to the district court which may ultimately be prosecuted by the district attorney, will not make such district attorney counsel in the case before the return of the indictment. In this case the examining trial of the accused was prosecuted by a county attorney prior to the election of the Hon. Rufus Hardy to the district judgeship, and while he occupied the office of district attorney. The indictment was found subsequent to his election to the district judgeship, and was presented at a term of court over which he presided. The record further shows that the district judge, while district attorney, had no connection whatever with the prosecution of the examining trial. *Held* that the objection to the qualification of the judge was properly overruled.

3. INDICTMENT—VARIANCE—IDEM SONANS.—In the indictment, in one place, the name of the injured party is spelled "Fauntleroy," and in another "Fontleroy," and the validity of the indictment is attacked upon the ground of variance in stating the name of the injured party. But *held* that the names as set out are *idem sonans*.

4. PRACTICE—CONTINUANCE—DILIGENCE.—The application for continuance failing to show the exercise of legal diligence to secure the absent testimony, and the said absent testimony, viewed in the light of the proof on the trial, appearing not to be probably true, the refusal of the continuance could not constitute cause for new trial.

5. SAME—EVIDENCE—BILL OF EXCEPTION.—Objection to evidence admitted on the trial will not be considered by this court when not presented by proper bill of exception.

6. ASSAULT TO MURDER—FACT CASE.—See the statement of the case for evidence *held* sufficient to support a conviction for assault with intent to murder.

APPEAL from the District Court of Navarro. Tried below before the Hon. Rufus Hardy.

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Statement of the case.

The conviction was for an assault with intent to murder one Baylor Fauntleroy, in Navarro county, Texas, on the thirteenth day of September, 1888. The penalty assessed against the appellant was a term of five years in the penitentiary.

Baylor Fauntleroy was the first witness for the State. He testified that, in September, 1888, he was in the employ of the St. Louis, Arkansas and Texas railway as brakeman on the passenger train. When the said train arrived at the depot in Corsicana the defendant and two negro women started to board it. Witness told defendant to wait until the disembarking passengers could get off. The two negro women soon mounted to the platform of the smoking car, into which car the witness directed them to go. Defendant, who meanwhile had mounted the second step of the first class coach, and was holding to the railing, told the women to go into that, the first class car. Witness asked him: "Have you a ticket?" Defendant replied: "Is that any of your business?" Whereupon the witness struck him several blows over the head and face with his fist. While the witness was striking the defendant with his fists a police officer seized defendant, pulled him off the steps and arrested both defendant and witness. Very soon thereafter a second police officer appeared and took charge of witness, and, at witness's request, took him across the platform to the officers of the railroad in the depot building, to enable witness to execute an appearance bond. Having arranged that matter, the witness started back to the train, and just as he stepped out of the office door to the platform the defendant struck him a blow with a knife across the side and back of the neck, inflicting a painful but not a necessarily serious wound.

Cross examined, the witness said that it was the usual custom of railway brakemen to cary arms, but that he was unarmed when he struck defendant, except that, by accident, he had a razor in his pocket. He struck the defendant with his bare first and not with "brass knucks." Witness was not a pugilist, but could strike a severe blow. He owned a pistol at that time, but it was in the possession of his brother at Gatesville, who anticipated serious trouble as the result of a "racket" in which he and witness had participated a few days before. This was the first trouble in which the witness had been involved. The knife with which the defendant struck the witness was a three bladed pocket instrument. The blade with

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which the witness was struck was the smaller of the two large blades, the said blade being an inch and a half or two inches long. On his re-examination the witness said that when he left the office to return to the car, after making his bond, he thought the defendant was on his way to jail with the officer who had him in arrest. After receiving the cut, the witness tried to reach the car to get a coupling pin with which to defend himself, and observed the defendant with the open knife in his hand struggling with two police officers, and trying to get to him, witness. It was the duty of the witness as brakeman to see that no person entered the car without a ticket. He did not know whether or not defendant was aware of that fact.

City policeman Pittman, who arrested defendant while Fauntleroy was striking him, corroborated the testimony of Fauntleroy in detail, and, in addition, stated that while City Marshal Cubley had Fauntleroy in the office, making his bond, he, witness, guarded defendant at the side of the office door, and was there with him about fifteen minutes before Fauntleroy came out. Defendant cut Fauntleroy just as the latter stepped out of the office. Witness then seized him, and with the assistance of Cubley subdued and disarmed him. Upon being disarmed the defendant exclaimed: "Revenge I wanted, and revenge I have, if I die for it."

City Marshal Cubley testified, for the State, that he appeared upon the scene just as Pittman was dragging defendant off the car steps. Pittman requested witness to take charge of Fauntleroy; which the witness did. After holding Fauntleroy on the platform five or six minutes, he took him into the office to make bond for his appearance before the recorder's court. Witness produced a blank bond, which was filled out and signed and delivered to him. They were in the office five or six minutes when Fauntleroy, ahead of witness, started out of the office to the train. Just as Fauntleroy stepped out of the office the witness heard, but did not see a blow. He thereupon rushed out and found Pittman struggling with the defendant, who, with an open knife in one hand, was trying to get at Fauntleroy. Witness and Pittman finally subdued the defendant, and witness took from him a pocket knife, the open blade of which was between two and two and a half inches long.

John Roberts testified, for the State, that he was on the platform at the time Fauntleroy was cut by defendant, but did not see the cutting. He saw Fauntleroy standing near the train,

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and saw Cubley and Pittman struggling to disarm the defendant. When they secured the knife, the defendant exclaimed: "Revenge is what I wanted, and revenge is what I have, and now you can kill me if you want to!"

The testimony of James Craft, for the State, though not as full, did not vary materially from the witness Pittman as to what occurred on the platform and at the office door at the time of the cutting. He could not repeat the exclamation made by defendant when disarmed. The State closed.

Martha Turner, one of the negro women who were with defendant at the time of the difficulty, testified, for the defense, that when she and her companion got on the car platform, the brakeman told them to go into the smoking car. Defendant, who was then upon the steps of the first class car, told them to go into that car. The brakeman asked defendant if he had a ticket. Defendant replied: "That is none of your business," whereupon the brakeman struck defendant several blows on the face and head with his fist, causing the blood to flow. Defendant and the brakeman were then arrested. Witness saw none of the subsequent proceedings.

Green Jamieson, one of the parties named in the defendant's application for continuance as an absent witness, appeared and testified for the defense, substantially as did Fauntleroy, for the State, except that he did not hear the conversation between Fauntleroy and the defendant and the negro women, which preceded the difficulty.

The application for continuance was filed January 21, 1889. For diligence it showed that affiant, on the fourth day of January, 1889, sued out subpœnas for Green Jamieson, R. Hall, J. Matilla and B. Collins, and placed the same in the hands of the sheriff for service; that up to the day of the filing of this application, he verily believed all of said witnesses resided in Navarro county, but that on this day he was informed that Hall was a resident of Dallas county, Matilla, as shown by the officer's return, a resident of McLennan county, and Collins of Limestone county. In this connection the application prayed for attachments to Dallas, McLennan and Limestone counties for the said witnesses. The application then stated that the affiant expected to prove by the said witnesses that, just prior to the alleged assault, he was beaten over the head most brutally and mercilessly by Fauntleroy, who in beating him used a pair of "brass knucks"; that the said beating was administered by

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Fauntleroy without provocation, and that the said alleged assault was committed immediately after the said beating administered by Fauntleroy, and while Fauntleroy was in an attitude to continue said beating.

R. B. Molloy and *Croft, Blanding & Croft*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant insists that the judgment should be reversed because the trial judge was disqualified from trying the case. This point was made in the court below, and the facts pertaining to the question are matters of record. From these it appears that at the time the offense was committed the Honorable Rufus Hardy, who, as judge of the district court (recently elected), presided at the trial, was the district attorney of his district, one of the counties being Navarro, the county in which the offense here prosecuted was committed. After its commission appellant was arrested and tried before an examining court, at which trial he was prosecuted by the county attorney. This was before Judge Hardy's election as district judge. After his election this indictment was found and presented in his court. It is shown by the bill of exceptions that he not only did not participate in the prosecution of the case before the examining court, but that in fact he never had heard of the case or had any connection whatever with it until, as district judge, he called the case upon the docket for trial.

A judge is inhibited from sitting in a criminal case when he has been of counsel for the State or the accused. (Const., art. 5, sec. 11; Code Crim. Proc., art. 569; Thompson v. The State, 9 Texas Ct. App., 649; Cock v. The State, 8 Texas Ct. App., 659; Railroad v. Ryan, 44 Texas, 426.)

It is only in counties where the district attorney resides that the county attorney does not perform the usual functions of his office. (Rev. Stats., art. 247.) In all other counties where there is a county attorney it is made his duty expressly "to attend the terms of county and other inferior courts of their respective counties, and to represent the State in all criminal cases under prosecution or examination in such courts," etc. (Rev. Stats., arts. 241, 247*a*, Sayles.) The district attorney is not required to aid or assist in such prosecution; and the fact that

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the prosecution may eventuate in the finding of an indictment which he may ultimately have to prosecute in the district court can not and will not make him counsel in the case until the indictment has been found. In this case, the judge having had no connection with the case in any manner whatever as counsel, was not disqualified from trying it.

Defendant's motion to quash the indictment was based upon a variance in the mode of spelling the name of the assaulted party and the party intended to be killed—the difference being that in one instance it was spelled Fauntleroy and in the other Fontleroy. If there was any such difference, then it amounted to nothing because the two names are *idem sonans.*

No error is made apparent on account of the overruling of defendant's application for a continuance. Sufficient diligence is not shown, and if it had been then we think it apparent from the trial evidence that the proposed testimony is not probably true.

Objections to the admission of evidence were not saved by bills of exception, and consequently are not entitled to be considered. The charge of the court was a full and fair presentation of law to all the legitimate phases arising upon the evidence, and there was no error in refusing the special requested instructions.

In our opinion the evidence is amply sufficient to support the verdict and judgment. The judgment is affirmed.

Affirmed.

Opinion delivered March 16, 1889.

27 386
28 309
29 464

No. 2684.

LON WILLARD *v.* THE STATE.

1. CORPUS DELICTI—EVIDENCE.—The criminal act and the defendant's agency in producing the act are issues which the State must prove in order to warrant a conviction for crime. But such issues may be established by circumstantial as well as direct evidence, and the legal test of its sufficiency is whether it satisfies the understanding and conscience of the jury beyond a reasonable doubt.

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Statement of the case.

2. SAME—CONFESSION.—A naked confession is not sufficient of itself to support a conviction. See the opinion on the subject.

3. SAME—CHARGE OF THE COURT.—Upon the ground that, independent of the confession of the defendant, the State had adduced no proof of the *corpus delicti*, the defense requested the trial court to instruct the jury, in effect, that before they could consider the confession of the defendant as inculpatory evidence, the proof of the *corpus delicti* must be absolute and beyond a reasonable doubt. One of the grounds upon which the court refused the requested instruction wa that the State, under the peculiar circumstances of this case, was en titled to have the confession considered by the jury. *Held*, that the ruling, in view of the other proof in the case, and of the general charge as given by the court, was correct. See the opinion on the question.

4. CATTLE THEFT—FACT CASE.—See statement of the case on this and the former appeal (26 Texas Ct. App., 126), for evidence *held* sufficient to support a conviction for cattle theft. And see the statement of the case for the general charge of the court referred to in the preceding head note.

APPEAL from the District Court of Eastland. Tried below before the Hon. T. H. Conner.

This appeal is from a second conviction for cattle theft. (See Lon Willard v. The State, 26 Texas Ct. App., 126.) Two years in the penitentiary was the penalty assessed against the appellant on this trial.

Except Ainsworth, who was not introduced on this trial, the witnesses who testified on the former trial, and whose testimony is set out in the former report, testified to substantially the same facts on this trial. Only the additional testimony adduced on this trial is set out in this report.

J. W. Hague testified, for the State, that the alleged stolen cow was one of a number in the same brand that belonged to him, but which at the time of the alleged theft was in the care, management and possession of J. S. Holloway. The witness knew the cow well, not merely by her brand, but by the peculiarity of her horns as described by the witness Holloway. The witness went to the house of the defendant soon after the alleged theft, and, in the presence of defendant, told his brother, Ed Willard, that he would be able to tell by the horns whether or not the cow killed by them was his, witness's, cow, and that if he, Ed. Willard, would show him the head, and the horns did not prove the identity of the cow, he, witness, would go on the witness stand at the trial and swear that the said cow was not

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his, and would thus secure defendant's acquittal. Ed. Willard replied that he did not know where the head was; that he took it off the stable to show it to Mr. Ainsworth, and then threw it on the ground and had not seen it since, and that he supposed it had been carried off by a dog or a hog. Defendant said nothing during the conversation between witness and Ed. Willard.

Sheriff Schmick testified, for the State, that the defendant was one of several prisoners who escaped from the Eastland jail on November 24, 1888, by cutting out through the roof. He was afterwards re-arrested in Tom Green county. Witness did not know which of the prisoners who escaped contrived the means of getting out.

Judge J. T. Hammons testified, for the defense, that shortly after the alleged theft, J. S. Holloway, in a conversation with him on the steps of the court house in Eastland, told him that he found a head and horns which he believed to be the head and horns of the cow referred to in the indictment, but that he was afraid that that would not amount to evidence enough to convict defendant, although it would do to put him to some trouble.

Major J. H. Davenport testified, for the defense, that he was present at the former trial of this case, and on that occasion heard the testimony of J. S. Holloway, including his description of the alleged stolen cow. After that trial witness saw a cow in the town of Eastland with horns similar in shape to the description given by Mr. Holloway. Witness could not state the age, color or brand of the cow he saw in Eastland.

In so far as under the rulings of this court it is necessary to be set out, the charge of the trial court reads as follows: "* * * 5. You are instructed that in this case the State relies on circumstantial evidence in order to establish the guilt of defendant of the crime charged. In considering this character of evidence, you are instructed that, in order to warrant a conviction of a crime, each fact necessary to the conclusion sought to be established, must be proved by competent evidence beyond a reasonable doubt. All the facts must be consistent with each other, and with the main fact sought to be proved; and all the circumstances taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged. And in this case, if on consideration of the evidence, there is any reasonable hypothesis consistent with the facts proved to your satis-

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faction, and inconsistent with the guilt of the defendant, he should be acquitted."

"7. I will now apply the law above given you to the facts of this case. If you should find from the evidence that the defendant, Lon Willard, on or about the fifteenth day of January, 1888, or at any time within five years prior to the time of the filing of this indictment, which was the thirtieth day of May, 1888, and in the county of Eastland, and State of Texas, did then and there fraudulently take the particular cattle mentioned in said indictment; and should you further find that, at the time and place of such taking by defendant, the J. S. Holloway mentioned in the indictment then and there had and exercised the actual care, custody and control and management of the animal so taken, and that said animal was so taken by the defendant without the consent of the said J. S. Holloway, and with intent then and there, on defendant's part, to deprive the owner of the value of the said one cattle, and to appropriate it to the use and benefit of himself, defendant, then and in such case defendant would be guilty as charged; and if you so find the facts you will find him guilty and assess his punishment at confinement in the penitentiary not less than two nor more than five years.

"8. In considering this cause if you should believe from the evidence that the one cattle described in the indictment was in fact stolen as alleged, yet if the evidence should raise in your minds a reasonable doubt that defendant is the person who committed the offense charged, you should acquit him; that is, if from the evidence you should find that defendant's brother, Ed Willard, or Fordy House, or some other person other than defendant, committed the offense charged, if committed at all, you should acquit; or if from the evidence you have a reasonable doubt as to this you should give the defendant the benefit of the doubt and acquit him."

"10. Again, if the cow's head and horns found by Holloway in the Willard pen (if he found one) was the head of some other animal, and not the head of the animal about which he testified, then defendant should be acquitted; or if from the evidence you have a reasonable doubt as to this question, defendant should be given the benefit of the doubt. You are further instructed that the defendant is presumed by law to be innocent until his guilt be established by legal evidence, and if from the evidence before you you have a reasonable doubt as to the de-

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fendant's guilt you should acquit him. As before given you in charge, you are the exclusive judges of the credibility of the witnesses, and the weight to be given to the testimony, and of the facts proved; but you must receive the law as given you in charge by the court, and be governed thereby."

B. F. Cotton, J. T. Hammons and *C. F. Clint*, for the appellant.

W. L. Davidson, Assistant Attorney General, *contra.*

WHITE, PRESIDING JUDGE. This is a second appeal from a judgment of conviction in this case. (See Willard v. The State, 26 Texas Ct. App., 126.) After a most thorough reading of the record in this appeal we are of opinion that there is but one question raised of sufficient moment to require a discussion at our hands.

It is most urgently insisted that there is no evidence of appellant's guilty agency in the alleged theft of the animal, save his own confession, or admissions amounting to a confession, and that this confession or admission, being uncorroborated, is not sufficient in law to warrant his conviction. In other words, it is contended that the corpus delicti of a crime can not be proven alone by the confessions of a party charged with the crime.

In all criminal prosecutions the rule is elementary that, to sustain a conviction, two things must be established, first, a criminal act, and, second, defendant's agency in the production of such act. (Whart. Crim. Ev., 8 ed., sec. 325; 3 Greenl. Ev., sec. 30.) In other words, there must be proof of the *corpus delicti* and the *identity of the prisoner.* But, whilst this is so, there is no one kind of evidence to be always demanded in proof of the *corpus delicti*, any more than of any other fact. It can seldom be proven by direct or positive testimony, and may be lawfully established by circumstantial evidence, provided it be satisfactory to the understanding and conscience of the jury beyond a reasonable doubt. (Brown v. The State, 1 Texas Ct. App., 154, and authorities cited; Merrill v. The State, 2 Texas Ct. App., 177.)

With regard to confessions, Mr. Wharton says: "While voluntary confessions of specific charges or of inculpatory facts are always admissible under the conditions above stated,

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they can not sustain a conviction unless there be corroborative proof of the *corpus delicti*;" and he cites a long array of authorities in support of the proposition. (Whart. Crim. Evid., 8 ed., sec. 632.) "It should be remembered," he says, "that the *corpus delicti* consists not merely of an objective crime, but of the defendant's agency in the crime, and unless the *corpus delicti* in both these respects is proved, a confession is not by itself enough to sustain a conviction." (Id., sec. 633.)

Defendant's counsel requested a special instruction upon this point, which the court refused because, as stated by the learned judge, "not the law as I understand it. A confession in some cases, uncorroborated, might be insufficient to establish the *corpus delicti*, but I think certainly in this case the jury may consider defendant's statements in connection with the other proof in determining the matter." There is no doubt of the correctness of the latter proposition as stated by the court. We have seen from the authorities that he is mistaken as to his first declaration that such an instruction would not be the law. The question is, if it should occur that the court erred in its opinion as to the correctness of the proposition of law, did the refusal of the instruction materially injure the rights of the defendant in this case? Was the instruction a part of the law applicable to the facts, and necessary to be given independently of the law as submitted in the general charge? In this case the court plainly and, as we think, fully instructed the jury upon all the legitimate phases of the testimony, including an elaborate instruction upon circumstantial testimony.

Now let us recur to the evidence in the case. The alleged stolen animal was a noted cow, and so peculiar was the size and shape of her horns that "she was known as old Broadhorns." The horns were, in addition to their length and size, very peculiarly turned and shaped. As described by the witness Brashear, "she had noted horns, very large, growing out towards the front, twisted up and flared out at the top." "Everybody in the whole country and settlement knew the cow by her horns." This cow was fat when last seen on her range near defendant's house. Defendant and his brother butchered beeves at their pen. The cow was missed from her accustomed range on the tenth of January. Shortly afterwards Holloway, the alleged owner, started to hunt for her, and went to defendant's house. As soon as defendant saw him, defendant looked excited and

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uneasy and went back to the house. Defendant's brother remained, and Holloway found, in looking around in the field among the weeds behind the stable, several cow heads and cow hides, cut all to pieces, and among these heads he found the head of his cow. He swears positively and emphatically: "These horns I know came from the cow above described, and I identified the same." Defendant and his brother denied at that time that they knew anything about the killing of the cow. That afternoon, however, Holloway went back to see them, and at this time the defendant admitted that he had killed the cow, and proposed to pay, and finally agreed to pay fifteen dollars for her. We are of opinion that, indepenent of the defendant's confession. the evidence was strong and cogent that the cow had been killed and at least that he was a guilty agent in the crime. We are not prepared to say that the evidence would not have been sufficient without his confession; there can be no question but that it abundantly corroborates his confession.

This being so, was it necessary that the court, in addition to the general charge as given, should have given defendant's special requested instruction with regard to the necessity for corroboration of the confession in order to establish the *corpus delicti*? Under the peculiar facts of this case and the charge as given, we do not think the law of the special instruction was essential, nor can we perceive how any possible injury could have been done defendant by the refusal to give it.

We are of opinion that the evidence, outside the confession, establishes beyond all reasonable doubt that the animal was identified as the property of the prosecutor, and that it had been stolen and killed, and that the evidence sufficiently establishes the guilty agency of the appellant. And whilst the instruction in a proper case was unquestionably correct as a legal proposition, we are of opinion it would have been unjust to the prosecution to have given it in this case, because it would perhaps have misled the jury to the erroneous conclusion that the *corpus delicti* had not been sufficiently proven independently of the confession, and have created a doubt where, in our opinion, no doubt could or should legally have existed.

Other errors assigned and insisted upon are not deemed by us reversible in their character in so far as the same appear to be supported by the record. Most of them are so fully ex-

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Syllabus.

plained by the record that they are made to appear entirely harmless or without merit.

We have found no error requiring a reversal, and the judgment is affirmed.

Affirmed.

Opinion delivered March 20, 1889.

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No. 2701.

FRANK WOOD v. THE STATE.

1. ASSAULT TO MURDER—INTENT.—The essential ingredient of the offense of assault with intent to murder is that the assault was accompanied by the specific intent of the accused to murder, and this ingredient must be established to the satisfaction of the jury.
2. SAME.—The offense of assault with intent to murder is proved when it is shown that, had death resulted from the assault, the offense would have been murder. Another test is that "if the assault is voluntary, committed with deliberate design and with an instrument capable of producing death in such manner as evidences an intention to take life, and there are no extenuating circumstances, it is an assault with intent to murder."
3. SAME—PRESUMPTION.—The rule is statutory that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the forbidden act." And it is elementary that 'a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears."
4. SAME—ABANDONMENT—PRACTICE IN COURT OF APPEALS.—If a party, intending to commit murder, uses a deadly weapon in such a manner as that his intent is apparent or may be fairly inferred from the act, he can not, by abandoning any further attempt at violence, mitigate the effect of his previous act or intention; and it is for the jury to determine, under appropriate instructions upon the law, whether, by what he did before he abandoned the further execution of his plans, he really and in fact intended to commit murder. And if they find that he did so intend to commit murder, and the facts justify the finding, then this court will not interfere with the verdict.
5. ASSAULT TO MURDER—FACT CASE.—See the statement of the case for evidence held sufficient to support a conviction for assault to murder.

APPEAL from the District Court of Bell. Tried below before the Hon. W. A. Blackburn.

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Statement of the case.

The conviction in this case was for an assault with intent to murder one Isaac Grubbs, and the penalty assessed by the verdict was a term of two years in the penitentiary.

Isaac Grubbs was the first witness for the State. He testified that on the evening of July 13, 1887—the day alleged in the indictment as the date of the offense—he and his brother drove some cows from their home to a water hole in a pasture, and after watering the cows turned them out of the pasture into a lane. When the last cow was driven out of the pasture the witness got off his horse to shut the pasture gate. About that time the defendant, who was in the pasture, rode up to the gate and said: "Hello!" Witness made no reply but continued closing the gate until it pressed against the defendant's horse, when defendant again said: "Hello!" Witness then replied: "How do you do?" Defendant asked: "Do you want to settle that?" Witness asked, in reply: "Settle what?" Defendant said: "That racket at the school house." Witness replied: "No; go away and let me alone; I want no trouble with you." Defendant said: "You would not have bucked up to me the way you did at the school house if Henry Easterling had not put you up to it. He put you up to it." The witness told him in reply that Easterling did no such thing. Defendant replied: "You are a liar, you son of a bitch!" He then crowded his horse against witness, and witness said to him: "Don't ride over me." Defendant replied: "I don't want to ride over you; I want you in the pasture; I will fix you there." He then struck at witness, or threw out his left hand at witness. Witness caught defendant's shirt sleeve and tore it off. Defendant then said: "I will do you up!" and thrust his hand into his pocket. He withdrew his hand with nothing in it, and then thrust it back into his pocket and withdrew it with a knife. He then opened the knife, got off his horse, and he and witness went to fighting. Witness was unable to say whether he or the defendant struck the first blow, but the defendant cut him in four places with the knife. One of the cuts began in the hair about an inch above the forehead, and extended down the forehead to the corner of the eye and nose, whence it skipped to the mouth, cutting the under lip and chin, and entering the neck at the collar or breast bone. Another cut on the left side of the neck was about five inches long. Another was a short cut under the left shoulder blade. The fourth was a cut seven inches long which extended from the left side to the breast.

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Statement of the case.

The said wounds confined the witness to his room about two weeks under the care of Dr. Mills. No person interfered to stop the fight—the parties quit of their own accord and caught their horses. As witness and defendant passed through the pasture gate after the cutting, the defendant said to witness: "You know you called me a son of a bitch, and struck me first." The witness had no weapon of any kind—not even a pocket knife—at the time of the fight.

Cross examined, the witness denied positively that he called the defendant either a liar or a son of a bitch. Just before the defendant accosted witness, the witness saw Loony Wood, the defendant's brother, going up the lane. He did not know how far Looney was from the pasture gate at the time of the fight. Dan Elliott and the witness's brother were present when the fight occurred—Elliott having come with the defendant. The witness denied that he struck at the defendant before the defendant dismounted, but, when defendant struck at him before dismounting, he caught defendant's sleeve and tore it off. The witness used his fist against the defendant's knife, which, as well as witness could judge by the view he got of it, was a medium sized red handled pocket knife. The next time the witness saw the defendant was in court about six months prior to this trial.

Dr. Mills, for the State, described the wounds on the person of Grubbs substantially as Grubbs described them, and stated that he at no time considered the said wounds as dangerous except in their liability to cause erysipelas.

Lee Grubbs, the brother of the injured party, was the next witness for the State. He testified that he was present and witnessed the difficulty between his brother Isaac and the defendant, which he detailed in substantially the same language as that used by Isaac in his testimony. He added that after the parties had quit fighting of their own accord, Dan Elliott said to the defendant: "You have done enough; let him alone." He was positive that Isaac did not call the defendant either a liar or a son of a bitch.

William Taylor, deputy sheriff of Bell county, testified, for the State, that, about six months prior to this trial (which was had in January, 1889), he received word from the sheriff of Lamar county that he had the defendant in custody. He went to Lamar county, about three hundred miles distant, and got defendant.

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Statement of the case.

The State closed.

Dan Elliott was the first witness for the defense. He testified that he was at the house of his mother-in-law, in Bell county, on the morning of July 13, 1887, when defendant and his brother came there on their way to Temple. They asked witness to go with them, which invitation the witness at first declined on the ground that he had nothing at the house to ride except a wild horse, of which he was afraid. The defendant proposed to ride the wild horse and lend his gentle horse to witness, whereupon witness agreed to and did accompany them to Temple. When they reached the lane referred to by the State's witnesses on their return in the evening, Loony Wood was riding eighty or a hundred steps in advance of witness and defendant. The horse ridden by the defendant frightened at a small bridge, and would not cross it until defendant struck him a severe blow with a quirt, whereupon the horse ran across the bridge, and to the pasture gate where Isaac Grubbs was. Witness rode on slowly, and, as he approached the gate, he heard defendant say to Grubbs: "You would not have bucked up to me like you did if Henry Easterling had not put you up to it." Isaac replied: "Don't you ride over me." Defendant said: "I am not going to ride over you." Grubbs replied: "You lie, you son of a bitch!" and struck or struck at defendant, it being the first blow passed or attempted. Defendant then said to Grubbs: "You called me a son of a bitch, and you have got to take it back." Grubbs denied that he had called defendant a son of a bitch. Defendant then got off his horse and he and Grubbs went to fighting, in the course of which fight Grubbs was cut. Grubbs struck the first blow while defendant was on his horse. The parties were not interfered with, and they stopped fighting of their own accord. As defendant passed out through the pasture gate, he said to Grubbs: "You know you called me a son of a bitch, and struck me first."

Cross examined, the witness said that the bridge where the defendant's horse became frightened was about seventy-five yards distant from the pasture gate at which Grubbs was standing and where the fight occurred. The defendant's horse ran immediately up to Grubbs and was very near Grubbs throughout the preliminary talk or quarrel. Defendant pulled out and opened his knife before he got off his horse. He got off his horse on the side next to and very near Grubbs, and they began

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Statement of the case.

fighting at once. Witness went to the house of the defendant's father on the morning after the fight, and while there told the parties present that when defendant pulled his knife he, witness, called to defendant: "Don't do that," and attempted to get down, but that his spur got hung in the stirrup and prevented him. He did not remember that at the same time he told the said parties that he saw nothing more, after calling on defendant not to use his knife until the parties began fighting. If he made that statement it was the truth, as the facts were then fresh in his mind. As a matter of fact he did, when he saw defendant pulling out his knife, call on him "not to do that."

Mrs. Wood, the defendant's mother, testified, in his behalf, that the knife owned by the defendant at the time of the fight with Isaac Grubbs, was a "small two bit red handled knife, with a blade about an inch and a half long."

Loony Wood, the brother of the defendant, testified, in his behalf, that he was between eighty and a hundred yards from and in advance of defendant when the fight occurred. Witness's attention was attracted by the voice of Isaac Grubbs calling defendant a "lying son of a bitch." He then looked back and saw the defendant get off of his horse and enter into a fight with Isaac Grubbs. He did not go back, nor did he attempt to stop the fight, supposing it to be merely a fist fight, and knowing the parties to be about evenly matched. When the defendant overtook him, after the fight, he saw that one of defendant's shirt sleeves was torn off, that the breast of his shirt had a small cut in if, and that one of defendant's fingers was split. Defendant's knife was a small single bladed, red handled instrument, the blade being one and a half or two inches long.

On cross examination, the witness said that he had a conversation with Bal Bingham on the day after the fight, but he did not remember telling said Bingham that he did not see the fight because of the corn, which was too high for him to see over it. Defendant, instead of going home that night, went with witness and Elliott as far as Mrs. Easterling's house and left. Witness next saw him on the following Christmas in Corsicana.

The defense closed.

R. A. Bingham testified, for the State, in rebuttal, that Isaac Grubbs stopped at his house after the cutting and got him to

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examine his wounds. On the next day Loony Wood came to witness's house and asked him if Grubbs was badly cut, and in the conversation that ensued remarked that he regretted the occurrence very much, and that he did not see the fight because of the high corn between where he was at that time and the place where the fight occurred.

D. N. Grubbs, the father of Isaac Grubbs (corroborated by C. C. Grubbs), testified, for the State, that Dan Elliott came to his house on the morning after the cutting, and said to witness: "You must not think hard of me, for I had nothing to do with it." Witness asked him why he did not stop the fight. He replied that when defendant started to draw the knife he called to him "not to do that," and attempted to dismount, but his spur got hung and prevented him, and that when he got his foot clear of the saddle the fight was over.

Harris & Saunders, for the appellant: With reference to the intent of the defendant we respectfully submit to this court that there is not a syllable of evidence, either on the part of the State or of the defendant, showing or tending to show any intention on the part of defendant to take the life of Grubbs. On the contrary, all the testimony shows the very reverse to be the case. While there is some difference between the witnesses as to whether the first blow was struck by Grubbs or the defendant, they all agree that after the boys had mutually fought a very short time they both stopped fighting of their own accord (no one interfering to stop them), and boylike walked out of the gate together and went in the same direction up the lane to catch their horses, and the little fight was over.

It seems these two boys had a few days before some little "unpleasantness" at school (as boys have had "from the time whereof the memory of man runneth not to the contrary," as school boys have every day all over the world, and as they will continue to have until schools and school boys are no more), in which defendant thought Grubbs had, perhaps under the patronage of one Easterling, unjustly domineered over him, and by the conjunction of the accident of his horse running away with him and the coincidence of carrying him up to where Grubbs was just coming out of a gate into the lane he was, without his own volition, brought up to Grubbs, when, after some words between them and, as two witnesses testify, after he

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was called a liar and son of a bitch, and was struck by Grubbs, he drew his pocket knife and dismounted, and they went to fighting. True, he inflicted three or four slight wounds upon Grubbs during the fight, with his pocket knife; but was it a deadly weapon? We think clearly not. The proof shows it was a very small red handled two bit pocket knife, with but one blade and that only an inch to one inch and a half long. Grubbs evidently did not regard it as a dangerous weapon, for, after he struck defendant and tore off his shirt sleeve as he attempted evidently to pull the defendant off his horse, he saw defendant take it out of his pocket and dismount, when, as he says, he commenced fighting defendant with his fist. And under all the circumstances, considering the relative strength of the two boys and the smallness of the knife, it could hardly be used by the defendant so as to be called a deadly weapon. Nor was it so used. Dr. Mills, who dressed the wounds on Grubbs, says he never considered the wounds inflicted as likely to produce death, or even at all dangerous of themselves. Then we are forced to conclude that, both from the insignificance of the weapon used and the manner of its use, it is patent to the most ordinary unprejudiced mind that the defendant neither intended or contemplated taking the life of Grubbs.

Is there any other evidence that is uncontradicted that evidently shows that defendant had no murder in his heart? There is undoubtedly evidence that removes even all doubt on this point. Evidence I may say "that pleads like angels trumpet tongued against this most unwarranted and inhuman conviction." It is the unanimous testimony of the witnesses both for the State and defendant that the boys "stopped fighting of their own accord; that no one interfered to stop them, and they walked out of the gate together; went up the lane and caught their horses," and no reference was made to their difficulty except that defendant, evidently giving his reasons why he had fought, said to Grubbs, just as they came out, "you know you struck me first, and called me a damned son of a bitch;" which Grubbs did not then deny. Now we submit that if (as is universally admitted to be true) the most convincing test of the intent of a party in a difficulty is what he does, then, tested by this rule, the mere fact that the defendant voluntarily, and without any interference or persuasion on the part of any one, ceased to fight Grubbs before he had inflicted upon him any serious bodily injury, when, as is charged, he had in

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his hand a deadly weapon and had every opportunity to take his life, is proof convinsive he had no such intention, and the conviction in this case is a shock to that sense of "even handed justice" which should always control juries in their deliberations.

This is nothing more nor less, at worst, than a mutual combat between these two boys, in which defendant took no advantage of Grubbs after engaging in the fight. For all the witnesses agree that before he got down off his horse—but not until after Grubbs had torn off his shirt sleeve, in trying evidently to pull him off his horse—did he draw his little pocket knife, which he did in full view of Grubbs, who says he saw him do it, and also says he went for the defendant, nevertheless, as soon as he struck the ground. Now where is the unfair advantage?

But did not Grubbs also use a knife or some other sharp instrument? We think that the evidence clearly shows that he did. The testimony of Loony Wood is: "Defendant's shirt sleeve, after the difficulty, was off. One of his fingers was also split open, and he had a little cut place in the front part of his shirt." This testimony is uncontradicted. Now we submit to this learned, impartial and honorable court, the facts proved do not warrant the conviction in this case. He has not had justice done him—that justice which is the pride and glory of our land and the heritage of its humblest citizen. We are fully aware of the disinclination of the courts, particularly in civil matters, to disturb the verdicts of juries where there is any reasonable excuse to uphold them; but in cases of the character of this, where technicalities are disregarded, when the great question of human liberty is involved, our law deals alone with the solitary fact of guilt or innocence, and will scrutinize with rigid rules the acts of juries, and visit their short comings with the prompt and ready hand of correction.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. At a former day of the present term we affirmed the judgment in this case without a written opinion. Distinguished counsel, representing appellant, have filed a motion for rehearing, and in addition to the able printed brief originally filed we have been favored and profoundly impressed with the oral argument submitted upon the issue

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presented in the motion. We are free to confess that the positions assumed in the argument are most plausible and persuasive, and, had we been upon the trial jury trying the case, it may be that under the facts we might have arrived at a different conclusion as to the grade and nature of the crime and the punishment to be awarded. We must, however, take the record as here presented, and if upon the record it appears that no material error has been committed in the trial below, and if the evidence, applied to the law, warrants and sustains the verdict and judgment, then, whatever might be our private opinion, feeling or sympathy, our duty is plain and the judgment must be affirmed.

Appellant was indicted for and has been tried and convicted of assault with intent to murder one Isaac Grubbs. We take the following statement of the material facts, which we have verified and found correct, from the printed brief of appellant's counsel:

Isaac Grubbs testified in substance that on the thirteenth day of July, 1887, while he was at the pasture gate, defendant rode up and hallooed "hello" twice; that he (Grubbs) said, "how do you do." That defendant said "do you want settle that?" That he asked him what? That defendant referred to a matter that had occurred at the school house. That he told him to go away and let him alone; that he wanted no trouble with him. That defendant accused Henry Easterling of putting him up to attacking defendant at the school house. That he denied it. That defendant said, "you lie, you son of a bitch." That he told defendant not to ride over him. Defendant said he did not want to, that he wanted to fix him, etc.; that defendant threw out his left hand at him—could not tell whether defendant's hand was closed or open,—that he caught the defendant's shirt sleeve and tore it off. Defendant then said, "I'll do you up." Defendant pulled out his knife, opened it and got down, and they went to fighting; can't say which struck the first blow; that during the fight defendant cut him in four places with his pocket knife (describes the wounds); that he and defendant quit fighting of their own accord; defendant said to him, "now you can go home;" they both went on in the same direction. As they went out of the gate, defendant said to him, "you know you struck me first and called me a son of a bitch;" that he had no knife and is positive he did not call defendant either a son of a bitch or liar.

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Opinion of the court.

Dr. Mills, for the State, described the locality and character of the wounds, and in addition stated, "I did not consider that the wounds as made were at all likely to produce death, or were dangerous." Lee Grubbs testified substantially as his brother. William Taylor, deputy sheriff, testified for the State that he went to Lamar county and got defendant, and brought him to Bell county about six months ago.

Daniel Elliott, for defendant, testified substantially that he went to and returned from Temple with defendant and his brother; defendant was riding a wild horse of witness's. As they returned in the evening, defendant's horse scared at a little bridge; defendant hit his horse with his quirt; the horse jumped the bridge and ran with defendant down to where the prosecuting witness, Grubbs, was at the gate; that he, witness, rode on after him slowly; heard Isaac Grubbs say to defendant, "you lie, you son of a bitch," and saw him strike defendant, or strike at him; defendant then said, "you called me a son of a bitch, and you have got to take it back;" Grubbs denied calling defendant a son of a bitch; defendant then got off his horse and they both went to fighting one another; Grubbs struck defendant first while he was on his horse; they quit fighting of their own accord; he told defendant after they had stopped that he had done enough; saw all the fight and was not related to either party.

Mrs. Wood, defendant's mother, testified that defendant was nineteen years old the seventeenth of October, 1888; was married on the tenth of October; his knife was a two bit one bladed red handled pocket knife, blade one to one and a half inches long.

A notable and indeed the important fact relied upon by appellant to show that his offense can not be assault with intent to murder is that, after inflicting the blows given, he of his own accord stopped voluntarily and abandoned the further prosecution of the fight. Learned counsel say in their argument "now we submit that if (as is universally admitted to be true) the most convincing test of the intent of a party in a difficulty is what he does, then, tested by this rule, the mere fact that the defendant voluntarily, and without any interference or persuasion on the part of any one, ceased to fight Grubbs before he had inflicted upon him any serious bodily injury, when, as charged, he had in his hand a deadly weapon and had every opportunity to take his life is proof convincive that he

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had no such intention, and the conviction in this case is a shock to that sense of 'even handed justice' which should always control juries in their deliberations."

There is no better settled rule of law than that, in assault with intent to murder, there must be *a specific* intent to murder. This intent is the essential ingredient of the offense, and its existence must be proven to the satisfaction of the jury. (Willson's Crim. Stats., secs. 857, 858, 859, and authorities collated; McCullough v. The State, 24 Texas Ct. App., 128; Moore et al. v. The State, 26 Texas Ct. App., 322.)

Article 502, Penal Code, provides, as a test on the trial of one charged with this crime, that "whenever it appears upon a trial for an assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent." In Yanez v. The State, 20 Texas, it is held that "if the assault is voluntary, committed with deliberate design, and with an instrument capable of producing death in such manner as evidences an intention to take the life, and there are no extenuating circumstances, it is an assault with intent to murder."

In article 50 of our Penal Code it is provided that the "intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act." It is also an elementary rule, and one of universal application, that "a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears." (McCoy v. The State, 25 Texas, 42; Aiken v. The State, 10 Texas Ct. App., 610; High v. The State, 26 Texas Ct. App., 546.)

Mr. Bishop says: "If a man undertakes to do a particular wrong of the indictable sort, and does some act towards it but fails to complete what he meant, his evil intent and act together constitute * * a common law crime, provided the act is not too trivial and small for the law's notice. For the intent is sufficient, and the adequacy of the act is the only further object of inquiry. Therefore an attempt is an intent to do a particular thing which the law, common or statutory, has declared to be a crime, coupled with an act toward the doing sufficient both in magnitude and proximity to the fact intended to be taken cognizance of by the law, that does not concern itself with things trivial and small. Or, more briefly, an attempt is an

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intent to do a particular criminal thing, with an act toward it falling short of the thing intended." (1 Bish. Crim. L., 7 ed., secs. 727, 728.) Further on the same learned author says: "On an indictment for a technical attempt the jury may take into view the nature of an act proved, to determine the intent which prompted it." (Id., sec. 735.)

As was said by Campbell, J., in The People v. Scott, 6 Mich., 287: "The intent to kill must be established as an inference of fact, to the satisfaction of the jury; but they may draw that inference, as they draw all other inferences, from any fact in evidence which to their minds fairly proves its existence. Intentions can only be proved by acts, as juries can not look into the breasts of criminals." (Trevinio v. The State, ante, 372.) The case of Jeff (a slave) v. The State, 39 Mississippi, 593, was where the accused had inflicted several wounds with a knife, a deadly weapon, but who, when the injured party released his hold of him, ran off without attempting further violence. The opinion is a most able and elaborate one, in which leading authorities, English and American, are reviewed and the conclusions of the court, as stated in the syllabus, are that "the law presumes that a party intends to do not only what he actually accomplishes, but also the natural and even probable consequences of his own acts when deliberately done; and hence, in considering technical attempts, the jury may take into consideration the nature of the act done and the attendant circumstances as matter of evidence to determine the particular intent with which it was performed; they may infer the specific intent to do a particular thing which is the necessary, natural or even probable consequence of the act proven to have been done. It is a probable consequence of the use of a deadly weapon in an assault and battery committed by one person on another that the death of the party assaulted may ensue; and hence proof of such use is *prima facie* evidence of an intent to kill, which must prevail unless overcome by other proof in the cause.

If a party intending to commit murder uses a deadly weapon in such a manner as that his intent is apparent, or may be fairly inferred from the act, he can not, by abandoning any further attempt at violence, lessen the effect of his previous acts and intentions, because they have already become accomplished facts. His crime has already been committed; he can not abandon what he has already done. It is for the jury to

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determine, under appropriate instructions from the court upon the law, as to whether by what he did before he abandoned the further execution and accomplishment of his plans, he really, and in fact intended, to commit murder. If they so find, and the facts are of a character to justify the finding, then this court can not interfere with the finding.

In the case in hand, the jury might have inferred, as they did, from the facts proven, that appellant, up to the time he stopped using his knife, intended to kill Grubbs. We can not say that such a finding is either against or is not warranted by the facts proven. There is no question made as to the sufficiency of the charge of the court in its presentation of the law applicable to the various phases of the case, and all the special requested instructions asked by able counsel in behalf of appellant were given. If there has been any error of omission or commission in the charge of the court, we have failed to find it.

We have given this case our most mature consideration, and we are constrained to say that, as it is presented to us in the record, we do not feel that we would be warranted or authorized to interfere with the verdict and judgment. The motion for rehearing is, therefore, overruled.

Motion overruled.

Opinion delivered March 20, 1889.

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No. 2958.

JEFF CLARK v. THE STATE.

1. EXTRA TERRITORIAL OFFENSES — THEFT — EVIDENCE. — This was a prosecution for theft — the indictment charging the theft of three horses in the Cherokee Nation and the bringing of the same into this State. The contention of the defense was that, inasmuch as under an act of the Congress of the United States a white man can not be prosecuted to conviction and punished for a theft committed in the Indian Territory except in the United States courts, he can not be prosecuted to conviction in this State for the theft of property in the Indian Territory, as theft is defined by the law of said Territory, and the bringing of the same into this State; that, as no act can constitute an offense unless a penalty for the commission thereof is provided, and as, un-

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der the act of Congress, a white man is not amenable to the law of the Indian Territory for theft, he can not within the purview of that law commit theft, it follows that he can not be prosecuted in this State under articles 798 and 799 of the Penal Code, and therefore the trial court erred in admitting in evidence the statute of the Cherokee Nation defining theft of live stock. *Held*, that the defense can not be maintained. The rule is that if a person commits in another State or Territory acts which, if committed in this State, would be theft, and the said acts constitute theft under the laws of the said State or Territory, and he subsequently brings the stolen property into this State, he can be prosecuted in this State and punished as if the theft had been committed in this State. The statute of the Cherokee Nation, admitted in evidence over objection, excepts no race nor class from its operation and clearly defines the offense of theft with penalty annexed, and it was properly admitted in evidence. See the opinion in extenso on the question.

2. SAME — CHARGE OF THE COURT. — The laws of the Cherokee Nation being in evidence, the trial court instructed the jury that, under said laws, certain acts constituted theft, and left it to the jury to determine from the evidence whether the defendant committed such acts. *Held*, sufficient; and that the court did not err in failing, in its charge to the jury, to define and construe the laws of the said Nation.

3. SAME—POSSESSION OF RECENTLY STOLEN PROPERTY.—See the opinion in extenso for a charge of the court upon the question of the possession of recently stolen property, etc., *held* correct and responsive to the proof.

APPEAL from the District Court of Tarrant. Tried below before R. J. Boykin, Esq., Special Judge

The indictment in this case, which was framed under articles 798 and 799 of the Penal Code, charged that the appellant did fraudulently take, steal, and carry away from the possession of G. W. Montgomery, in the Cherokee Nation, Indian Territory, who was holding the same for the owner, S. S. Cobb, three certain horses, with the intent, etc.; which said acts, by the law of the said Cherokee Nation, then in force, did constitute the offense of theft; and that thereafter he brought the said horses into the county of Tarrant, State of Texas. Under this indictment the appellant was convicted of theft, and his penalty was assessed at a term of five years in the penitentiary.

S. S. Cobb was the first witness introduced by the State. The material facts to which he testified were that he lived on his ranch in the "Cherokee Strip," in the Cherokee Nation; that the horses mentioned in the indictment belonged to him, but, when taken, were in the possession of his agent, Mont-

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Statement of the case.

gomery; that the same were taken by some person unknown to him, and without his consent, about the time alleged in the indictment—May 5, 1888—and that he subsequently recovered two of the said horses in the city of Fort Worth, Texas.

G. W. Montgomery testified, for the State, in substance, that he lived at Cobb's ranch in the Cherokee Strip, and, in the absence of Cobb, exercised control over the said ranch and the stock appertaining thereto. The defendant, whom the witness had known for eighteen months, and who, during that time, had worked on a ranch adjoining the Cobb ranch, in the Cherokee Strip, spent the night of May 5, 1888, with the witness at the said ranch, leaving there late on the next evening, and going in a westerly direction. Three of Cobb's horses failed to return to the ranch on that night, and on the next day the witness instituted diligent but unsuccessful search for them. He found the south gate of the pasture open, and that the said three horses and others had left the pasture through that gate. Witness recovered all but the three horses mentioned in the indictment. Subsequently Mr. Cobb recovered two of the last mentioned horses in the city of Fort Worth. The said three horses were taken without the knowledge or consent of the witness.

T. F. Walker testified, for the State, that he lived in Fort Worth, Texas, and was the proprietor of the Central wagon yard, on Main street, in that city. Between ten and eleven o'clock on the morning of May 17, 1888, the witness met the defendant on Houston street, in Fort Worth, on which occasion the defendant told witness that he wanted to sell the horse he was riding and another horse which he had just left in the witness's wagon yard. Witness replied that buyers could be readily found in Fort Worth, and that if the animals upon inspection suited him, he might, perhaps, purchase himself. Witness and defendant then went to the wagon yard, where the defendant pointed out the second horse, and witness offered him fifty dollars for the two. The defendant replied that he would not take less than one hundred dollars for them. The witness then asked him where he got the animals, and he replied that he got them in a trade with a hired hand of one B. C. Evans, a cow man, who, he said, lived ten or twelve miles northwest of Aurora, in Wise county, Texas—Aurora being about twenty-five miles northwest of Fort Worth. After a prolonged conversation, the witness offered the defendant sixty dollars for

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the two horses, and he agreed to sell them to the witness for that price. The witness then declined to purchase until the defendant should satisfy him as to his title to the said horses. Defendant then said that he would go up town and see if he could find an acquaintance from Wise county through whom he could satisfy witness. After a prolonged absence he returned and reported that he could find nobody from Wise county. The witness again declined to purchase until satisfied about the title. The defendant then proposed to leave one of the horses in the custody of the witness, and on the other to go to Decatur in Wise county to arrange the necessary proof of title. He proposed that if he should satisfy the sheriff of Wise county and the Decatur bank about his title he would deliver the horse ridden off by him to the said sheriff for the witness, if witness would remit him the purchase money through the said Decatur bank. To this proposition the witness agreed, and defendant left witness a short while before sundown, ostensibly to go to Decatur, which was about twenty-five miles distant. His horse was then very much jaded, and at that time he had no slicker. It rained during the said night. At about six o'clock on the next morning the defendant came to witness's wagon yard and handed witness the note now offered in evidence. Substituting spaces for hieroglyphics—the design of a heart above a cross—the note reads as follows:

"Mr Walker, those horses that Mr Clark sold to you is all right. I will bee responsible for them. One black horse, brand ——— and G on left sholder E on thigh. Bay ——— circle Z on left sholder E on thigh.

"B. C. EVANS."

The witness exhibited the note to several citizens of Fort Worth, including the merchant of that name, and inquired if they knew such a man who resided in Wise county. The witness then returned the note to defendant, telling him that he was not satisfied with the showing of title. Defendant told witness that he went to see Evans during the night, and got him to write the note. His horse did not look any more jaded on that morning than he did on the night before, and showed no evidence of travel during the preceding night. Witness then reported the matter to officer Witcher. Subsequently witness turned the horses over to S. S. Cobb.

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Statement of the case.

Officer Witcher testified, for the State, that the witness Walker, on the morning of June 18, 1888, informed him about the defendant having two horses in his, Walker's, wagon yard, and witness went to the said yard to investigate the matter. He asked defendant if he had any horses for sale. Defendant replied that he had two, and showed them to witness. Witness asked him for his bill of sale. He replied that Walker had it; that he went to see Evans on the night before and got him to write it. He said that he got the horses from a man in the employ of Evans. Witness then asked him if he made the trip to Evans's house in one night. He replied that he did not have to go all the way to Evans's house, as he met Evans between Aurora and his home between mid-night and one o'clock, when Evans, by light of a buffalo chip fire, wrote the note. The witness then arrested defendant and took him to the calaboose. Upon searching him he found the Evans note in a pass book in his pocket. The note showed to have been written on a leaf torn from that book. The defendant's horse—the one he claimed to have ridden to Wise county on the night before,—showed no sign of having made the trip. The roads between Fort Worth and Aurora were very bad in wet weather, and there was a rainfall on the said night.

R. H. Tucker, a hand-writing expert, was next introduced by the State. After comparing the note in evidence, purporting to have been signed by B. C. Evans, with two of the defendant's acknowledged signatures, he testified that the said note was evidently written by the defendant.

The State next introduced in evidence the following extract from the laws of the Cherokee Nation: "Every person who shall wilfully take or steal a horse, mule, ass or cow, shall be deemed guilty of a felony, and upon conviction be imprisoned not less than three years nor more than seven years, and be fined for the benefit of the injured party in a sum double the amount of loss or damage sustained. And every person found a second time guilty of a violation of this section, shall be imprisoned not less than seven nor exceeding ten years, and be fined as above."

The State closed.

Sam Murrell, the brother-in-law of the defendant, testified, in his behalf, that he, witness, lived in Cooke county, Texas. Defendant left witness's house about two weeks before his arrest upon this charge. He was then riding his own horse, worth about seventy-five dollars, and had seventy dollars in money.

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Argument for the appellant.

During the larger part of the three or four years preceding the arrest of defendant, he, defendant, worked with cattle in the Indian Territory. Witness knew a man named B. C. Evans, who claimed to live in Wise county, and had seen that man in Wise county. He considered that man a "bad egg."

The two remaining witnesses testified that they were acquainted with the reputation of the defendant for honesty, etc., and that it was good.

C. B. Stuart, for the appellant: I desire to call the attention of the court to that assignment of error which relates to the question as to whether or not a white man can commit the offense of theft against the laws of the Cherokee Nation. The other assignments are fully relied on by appellant, but do not, we think, need discussion, as they are both based upon elementary principles of law with which the court is, of course, familiar. The question then recurs: "Can a white man commit the offense of 'theft' against the law of the Cherokee Nation?" or "would the 'act' committed by appellant be theft under the laws of the Cherokee Nation?" These questions embrace both phases of our statute, and to our minds admit of but one answer.

Of course it will be conceded by the State that a white man can not be *punished* or *charged with crime* under the penal laws of the Cherokee Nation or any other portion of the Indian country. The decisions cited by appellant in his brief are conclusive of this point; and besides, it is so well settled by the courts of the country, and is so universally recognized and conceded both by the Indian and the Federal authorities, that any attempt to further discuss this branch of the subject would be a direct thrust at the intelligence of this court. Any lawyer who is familiar with the political relations of the Indian country to the United States, and who will examine the Federal Statutes and treaties, will conclude in a moment that white men are not within the purview of the penal statutes of the Indian country. (Rev. Stats. of The United States, secs. 2145, 2146, 5356; 4 Howard, 567; 47 Wis., 296; 7 Fed. Rep., 894; 20 Id., 299.)

If, then, a white man can not be charged with crime under the laws of the Cherokee Nation, and can not be punished for an offense against such laws, can he commit an "*act*" which would be "theft" under their laws? Clearly not; because in

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the first place, if there is no *offense there is no crime*, and where there is no *punishment* there is, in legal contemplation, no *crime* or *offense:* and because, in the second place the Indian laws have no reference to white men—were not made for their benefit, and were never intended to affect them in one way or the other. Such laws stand as if white men were, by *positive statute of the Cherokees, excepted* from the operation of such laws. The Federal Statutes and decisions both declare that white men are wholly unaffected by Indian laws, and, therefore, when the Cherokee Statute declares that "any person" who commits certain acts shall be guilty of theft, it means, of course, "any person" who is within the purview of such law, or who is embraced within its meaning. A white man can not be brought within the spirit and meaning of such law, because the Federal Statutes say he can not.

It follows, therefore, irresistibly, as a logical conclusion, that the penal laws of the Cherokee Nation, are, as to white men, *no laws at all*, and stand as to such white men *as if they never were enacted.* Thus the position that a man can commit an offense against a law which has no existence is reduced to a logical absurdity. Our statute under which this prosecution is brought declares that, in order for the defendant to be convicted in this case, the "act" committed by him in the Cherokee Nation must have been an *offense* against its laws. The indictment charges the offense against the "*Cherokee Laws*," and hence the proof must correspond with that allegation. The "act," under the indictment, can not be shown to be an offense against any other law, because there is no allegation to that effect. The defendant is here to meet the charge as made by the indictment. The law requires him to do no more.

In order to comprehend more fully the meaning of our statute which is applicable to this cause, it is well to look to the public policy which gave rise to its enactment. It is clear, at a glance, that the legislature, in passing this statute, intended to punish those offenses only which were *penal* in the jurisdiction where the *initial act* was committed. Why do I say this? Because the statute declares that, in order to hold the defendant for theft here, the "act" must have been theft in the "foreign country, State or Territory" from which the property is brought. If the defendant has committed no act for which he may be punished in the foreign jurisdiction, then he has committed no offense against the penal law of that jurisdiction,

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however much he may have transgressed the Divine Commands. It is true the Cherokee law denounces theft and prescribes a punishment. But it doesn't apply to the white man. Therefore I say that the act of the defendant was not "theft" within the meaning of our statute. Whoever heard of a statute in reference to theft which did not prescribe a punishment? In legal contemplation where there is no punishment there is no theft. Wouldn't it be a foolish thing (it would certainly be an unlawful one) for the Texas legislature to pass a statute punishing a man for doing something in another State for which he could not be held or charged, or punished, in such latter State. Such a law would be the refinement of absurdity. It is needless to say more. Men can not demonstrate axioms. The "self evident" does not come within the legitimate domain of logic. When the concession is made, as it must be, that a white man can not be punished or charged under the Cherokee laws, it seems to me that the battle is won. This question is of the highest and most vital importance. It will be of frequent recurrence, and hence requires a most careful investigation.

The proper construction of the statute under which this prosecution is pending is one, it seems to me, of very little practical difficulty. It is the first time that the question has ever been pointedly before this court, and in reaching a conclusion the court should, it seems to me, look to the policy of the law and its spirit; for these are the cardinal points from which the investigation should begin. Nor should the court be unmindful of the opinion of the legal profession in Texas upon this point, which is, as far as I know, unanimous in its indorsement of the position contended for in this cause by appellant.

W. L. Davidson, Assistant Attorney General, filed an able brief and argument for the State.

HURT, JUDGE. This is a conviction for the theft of a horse in the Cherokee Nation, Indian Territory, and bringing the same into Tarrant county, Texas, the prosecution being under articles 798 and 799 of the Penal Code.

There was no error in receiving in evidence the laws of the Cherokee Nation, unless the fact that appellant is a white man defeats the prosecution. Hence the question is, under the provisions of the above articles of our code, construed with reference to the laws of the Cherokee Nation and the acts of

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Congress bearing upon this matter, can a white man be legally prosecuted to conviction for stealing in said Nation, and bringing the stolen property into this State? The counsel for appellant, in a masterly argument, contends that a white man can not commit the offense of theft against the laws of the Cherokee Nation; or, to present the question in another form, that the act committed by appellant would not be a theft under the laws of the Cherokee Nation; that, as a white man can not be punished for violating any law of the Nation, but is punishable for his acts committed in the Nation by the federal courts, and punished because such acts have been denounced as an offense by an act of Congress, the articles of our code cited can not apply to or embrace white men.

This is a plausible, yea, a strong position, and was supported at Tyler by a most cogent argument by Mr. Stuart. It is contended that, though the acts committed by appellant are forbidden by positive law (of the Nation) with punishment annexed on conviction, yet as appellant, because a white man, could not be punished under the said law, therefore he could not commit the offense in the Territory as required by article 798. This article must be construed in connection with article 799, which reads as follows: "To render a person guilty under the preceding article it must appear that, by the law of the State or Territory from which the property was taken and brought to this State, the *act* committed would also have been robbery, theft or receiving stolen goods." The *act* must appear to be theft by the law of the Territory.

Did it so appear? This is not denied by appellant, but he replies through counsel that he can not be punished under the territorial laws, and where there is no punishment there can be no offense. The law of the Nation is broad and comprehensive in its terms. It says: "Every person who shall wilfully take and steal a horse," etc. It is not confined to Indians, nor does it except from its operation white men. An indictment against an Indian, to be sufficient, would not have to allege that the accused was an Indian, or negative that he was a white man. Therefore, whether the act, theft, be committed by an Indian or white man, it is forbidden by positive law, and there is annexed, on conviction, a prescribed punishment. The language of the act of the Territory is not such as makes the fact that the person was an Indian an element of the offense. If this had been the case, no person except an Indian could

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have been guilty, though he may have committed all the acts denounced as theft. But the law is not thus written; it embraces every person, white, black, or Indian. The act committed by appellant therefore was, by the law of the Territory, theft.

But, says counsel for appellant, it was not theft in appellant, because for want of jurisdiction, the courts of the Territory could not punish him. The act of the Territory defining theft embraces every person, and there is punishment annexed to its violation. This is not a case in which the law denounces acts as a crime, but fails to annex a penalty to such crime. To the contrary, all persons are embraced, and for a violation a penalty is prescribed. How, then, does the fact that appellant can not be punished under the Territorial law negative or refute the conceded actual facts, viz: That he, in fact, did commit an act in said Territory; that the act committed was theft, and that it was theft by the law of said Territory, whether committed by an Indian or white man? If the act committed is theft by the law of the Territory, and is theft here, and the stolen property is brought to this State, the party should have been convicted whether he could have been punished under the laws of the Territory or not. This is our deliberate conclusion after mature reflection.

Second assignment. The court erred in not defining and construing in its charge to the jury the law of the Nation, and in leaving the question to be determined by the jury without appropriate instructions. In this there was no error. The laws of the Nation were introduced in evidence. The court should have instructed the jury that certain acts, by said laws, constitute theft, leaving it to the jury to determine whether the defendant was guilty of such acts, and this was done by the court. But suppose the matter was left to the jury and they held that said acts did, by the laws of the Nation, constitute theft. We have the acts of the defendant before us, and we are of opinion that the jury's construction of said law was correct; and there is no injury.

Third assignment. The court erred in not presenting affirmatively in the charge defendant's theory of the case, which was that he had purchased the horse from hands working for B. C. Evans, in Wise county. Bearing upon this matter, the court charged the jury: "When the possession of the property recently stolen is relied upon as a criminative fact, if such pos-

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session is proven, and the person in whose possession such property is found, when his possession is first questioned, makes a reasonable explanation of his possession, the evidence must show that such explanation is false before such possession would, of itself, warrant a conviction." Appellant was found in possession of the stolen property. He explained by stating that he had purchased it from the hands of Evans, in Wise county. The purchase was his reasonable explanation of his possession. The jury were told that before his possession could be used against him, if reasonably explained, the evidence must show it false. Under the facts of this case, this charge was correct.

We find no error in the record, and the judgment is affirmed.

Affirmed.

Opinion delivered March 23, 1889.

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No. 2554.

Jim McCoy v. The State.

1. Practice—Change of Venue.—The trial judge, of his own motion, changed the venue of this case from L. to B. county, the said B. county not being within the same judicial district. The objection urged by the defense was that the venue was changed to a county in another judicial district, and not to F., the nearest county in the same district. But among the reasons assigned by the judge for changing the venue to B. county instead of F. county, it appears that to his knowledge the said F. county was subject to the same objection as L. county. *Held*, that the venue was properly changed to B. county.

2. Same—Evidence.—A State's witness was permitted to testify that, about two or three weeks before the homicide, the defendant, in the presence of the witness and others, said that if the deceased ever came to Twohig he had better come shooting or he would not leave there alive. The objection urged was that the evidence did not tend to show the complicity of the defendant as a principal actor in the homicide, nor to establish a conspiracy with C., who was the actual perpetrator, to kill the deceased. *Held*, that the proof showing defendant to have been present at the homicide, the evidence was properly admitted in corroboration of attending circumstances evidencing not only a conspiracy to murder the deceased, but that the defendant and C. acted in concert in the perpetration of the murder.

Same—Cross Examination.—It is a general rule that a witness can not avoid answering a question that is material to the issue, upon the

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ground that it imputes disgrace to himself, unless such disgrace amounts to crimination. Under this rule the trial court did not err in refusing to permit the defense, upon cross examination, to ask a State's witness if he did not, upon the trial of one W., for rape, endeavor to get the defendant to procure false testimony against W., such proposed evidence being material to no issue in this case.

4. MURDER—CHARGE OF THE COURT.—Omission or refusal of the trial court to submit in charge to the jury the law of murder in the second degree, when the evidence establishes only the higher grade, is not error.

5. SAME—PRACTICE IN THE COURT OF APPEALS.—The appellate court, in determining the question whether injury or probable injury resulted to the accused from the giving of an erroneous, or the omission of a necessary, instruction, must consider the charge in its entirety and as applied to the evidence embodied in the statement of facts.

6. SAME—CHARGE OF THE COURT.—In this case the general charge of the court clearly and concisely hinged the guilt of the accused upon the question whether he was present when C. killed the deceased, and, knowing the unlawful intent of C., aided or encouraged C. in the killing of the deceased; or whether he advised or agreed to the killing of the deceased by C., and was present when C. killed the deceased. The defense requested an alternative charge based upon the theory that C., unaided in any manner by the accused, shot and killed deceased, and that the shooting of one E., at the same time and place by the accused, was a distinct and separate transaction from the killing of the deceased by C. The trial court gave the requested instruction with the following qualification: "The foregoing charge is given in subordination to the general charge regarding principals." This qualification was not excepted to, but was urged as cause for new trial, and is relied upon in this court for reversal, the defense maintaining that, if the evidence does not clearly establish its theory, it leaves it in doubt, and that its said theory should have been submitted to the jury affirmatively, subordinate to no other charge and untrammeled by any qualification whatever. *Held*, that abstractly the objection is sound, and if based upon sufficient evidence or opposed by insufficient inculpatory proof, would require a reversal of the conviction; but, the evidence not only refuting the theory, but establishing beyond peradventure the propositions propounded by the general charge, the qualification appended to the special charge by the trial judge did not inure to the injury of the defendant.

8. MURDER—FACT CASE.—See the statement of the case for evidence *held* sufficient to support a capital conviction for murder.

ON MOTION FOR REHEARING.

9. PRACTICE—EVIDENCE—POSTPONEMENT FOR SURPRISE.—The motion for rehearing shows to the satisfaction of this court that, by reason of a clerical error in a bill of exceptions, the original opinion states that the witness E. testified that the threats of the deceased were to be executed at Cotulla, whereas in fact the said witness testified that Twohig

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was the place whereat, in the event of the deceased going there, the threats would be executed. But *held* that, notwithstanding this showing, the motion for rehearing must be denied, because, in the light of the evidence on the trial, the absent testimony, if adduced, could not have affected the result of the trial.

Appeal from the District Court of Bexar, on change of venue from the District Court of La Salle. Tried below before the Hon. G. H. Noonan.

The indictment in this case was filed in the district court of La Salle county, on the tenth day of May, 1887. It charged the appellant with the murder of C. B. McKinney, in the said La Salle county, on the twenty-sixth day of December, 1886. On the thirteenth day of May, 1887, the appellant was arraigned in the district court of La Salle county, when the trial judge, of his own motion, changed the venue of the case to Bexar county. At the June term, 1888, of the district court of Bexar county, the appellant was placed upon trial, was convicted of murder of the first degree and awarded the death penalty.

S. V. Edwards was the first witness for the State. He testified, in substance, that in December, 1886, he occupied the offices of deputy United States marshal, deputy sheriff of La Salle county, and deputy hide and animal inspector of the same county. Captain C. B. McKinney, the deceased, was then the sheriff of La Salle county, and had occupied that office two terms. The witness had known the defendant since 1874 or 1875. The witness and deceased lived in Cotulla, La Salle county. On the twenty-sixth day of December, 1886, the deceased sent for the witness to go with him to Mrs. White's ranch, about six miles east from the town of Twohig, in La Salle county, for the purpose of arresting one Dow White on a charge of raping the daughter of a Mrs. Gallaway. The witness reported to the deceased and they left Cotulla on the two o'clock p. m., train, for Twohig. Before leaving Cotulla the witness and deceased were joined by Dr. Bain, who was going to Mrs. Gallaway's house for the purpose of making a medical examination of the alleged ravished girl. They arrived at Twohig between four and five o'clock in the evening. The defendant lived between three and four hundred yards east from the railroad depot at Twohig station. Witness saw the defendant in Twohig as soon as he got there, and a few minutes later

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the defendant was joined by Bud Crenshaw, in front of Bain's store, where they held a short conversation. Defendant then met witness, and, after a few words of friendly conversation, asked what he and the deceased had come to Twohig for. Witness replied in a joking manner: "Ask me no questions, and I will tell you no lies." A few minutes later the defendant and Crenshaw started off together towards the defendant's house—both being on horseback. They passed deceased and witness about the railroad crossing, and when they had gone about twenty steps, Crenshaw turned and started back towards deceased. He had retraced his steps about half way when defendant said to him: "Come on, Bud." Crenshaw motioned his hand behind him at defendant, and went up to deceased and said to him: "How are you, Charley?" Deceased replied: "How are you, Bud?" Deceased and Crenshaw then shook hands, and deceased asked Crenshaw how he had passed Christmas. Crenshaw replied that he had had "a fine time, got drunk, but was sober now." They then told each other good bye, and Crenshaw rode off and overtook defendant. Deceased was in conversation with W. A. Stewart when accosted by Crenshaw. Witness and deceased got horses at Twohig, and employed Benito Santos to guide them to White's ranch.

Of the two routes which led from Twohig to White's ranch, witness and the deceased took the more easterly one, which passed by the defendant's house. When they reached a point within fifty or sixty yards of the defendant's house, they saw the defendant and Crenshaw on the west side of the house, near the door. They had apparently just emerged from the house at that door, and they almost immediately disappeared around the south side of the house. The witness next saw them as he and deceeased approached the east side of the house. They were then sitting or squatting down, facing the path or trail along which witness and deceased were riding. There was a blanket spread under them, and a pillow on the blanket. Defendant was sitting flat on either the blanket or pillow, and two six-shooter pistols lay on the blanket, one on each side of him. Defendant and Crenshaw each had a Winchester rifle in hand, with the muzzles pointing across the road in the direction that witness and deceased were to travel. Upon reaching a point near the said parties, deceased directed Dr. Bain and Santos to ride on ahead, to be overtaken presently by him and witness. Bain and Santos rode on and witness and deceased stopped, when

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deceased called to Crenshaw: "Bud, I want to see you a few minutes." and rode off thirty or forty steps, leaving witness with or very near the defendant. Crenshaw got up, cocked his gun, and then let the hammer down and approached deceased with the gun across his arm and in a position to shoot deceased. Deceased was then sitting side ways on his horse, with his right leg thrown over the neck of his horse, his right elbow resting on that leg, and his head on his right hand—his body leaning a little forward. In that position he talked a few minutes to Crenshaw, who was standing on the ground by the side of McKinney's horse, holding his Winchester with both hands, and the muzzle pointing towards McKinney. McKinney's pistol was in the scabbard on his right hand side. He had nothing in his hands, and both hands were gloved. During this time witness and defendant were engaged in a conversation of some trivial character. Finally defendant, in a low tone of voice, asked witness for a chew of tobacco. Witness had his tobacco under his gloves and handkerchief in the right-hand pocket of his sack coat. While getting it out he heard Crenshaw ask McKinney: "What is the matter, Charley?" or perhaps McKinney asked Crenshaw: "What is the matter, Bud?" he was not certain which. About that time, the witness having at the moment succeeded in getting his tobacco from his pocket, the defendant repeated, in a loud tone of voice: "Give me a chew of tobacco, Pete!" Witness threw the tobacco to him, and at that instant heard the report of a gun fired at the point where Crenshaw and McKinney were. Witness looked that way instantly and saw McKinney falling from his horse, and Crenshaw presenting his gun at him, with the muzzle almost touching his chin. As McKinney fell, Crenshaw pushed the gun against his breast and fired again. When the witness turned to look at deceased and Crenshaw, exposing his left side to defendant, the defendant shot witness, the ball entering the lower part of the left shoulder blade, ranging upward and passing out through the top of the left shoulder, shattering the bone.

Upon receiving the shot described, the witness, who with difficulty maintained his seat on his horse, looked toward defendant and saw him in the act of firing on him a second time. The witness could not manage his horse, which ran off with him when the first shot was fired by defendant. One or two more shots were fired at witness as his horse fled, and a shot

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was fired at him from inside the defendant's house. The last mentioned shot could not have been fired by either defendant or Crenshaw, because neither of them could have reached the house by that time. Witness saw no person about the said house other than defendant and Crenshaw, and could not imagine who fired the shot from the inside of the house. Seven or eight shots in all were fired, one of which passed through the left shoulder of the witness's coat. On reaching the immediate vicinity of the defendant's house, the witness saw two horses standing at and tied to the northeast corner of the house. Each of the horses had on a bridle and saddle, and there was a wallet or bundle secured to one of the saddles. Before reaching the defendant's house McKinney told witness that he was going to stop there and get Crenshaw to go to White's ranch with him and witness. Defendant and Crenshaw had their Winchester guns when witness first saw them in Twohig. Crenshaw was standing immediately by the side of McKinney's horse just before he fired the first shot. McKinney had a buckskin glove on each hand, and had no weapon of any kind in either hand when shot. When the witness was shot, his horse sprang toward Crenshaw, Crenshaw threw his gun down on witness, and at that instant defendant fired the second shot at witness. Witness saw the body of McKinney about an hour after he was killed, and was told at that time that McKinney was shot four times. Witness had not seen Crenshaw since the killing of McKinney. About three weeks before the killing of McKinney, the witness stepped into Butler's saloon in Cotulla, where he met defendant—defendant having sent for him. Defendant appeared to be very angry on that occasion, and denounced McKinney to the witness as a "damned son of bitch." This remark about McKinney, who was a friend of the witness, inflamed the witness, and he made some denunciatory reply to defendant. One word brought on another, until defendant drew a pistol. Witness instantly drew his, when defendant subsided, and said something about fighting a duel, proposing, as witness understood him, that he and Crenshaw would fight a duel with witness and McKinney. He then said that if McKinney ever came to Twohig he had better get off the train shooting, or he would never leave there alive.

Cross examined, the witness said that sometime after the conversation in Butler's saloon, as detailed above, he met the defendant in the streets of Cotulla, when defendant undertook

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to "smooth over" the matter by telling witness that he would not have said what he did in the saloon but that he was drunk. He was drinking somewhat at the time of that conversation. The witness knew as a matter of fact that defendant did not like McKinney. He could not say that McKinney had any particular grudge against the defendant, but he had said to witness that the defendant was a fool. McKinney had several times arrested defendant for being drunk and disorderly. He arrested him at Twohig once for being drunk and having a pistol, over which matter he and defendant had some trouble. Witness could not state how long the ill feeling between defendant and McKinney had existed before the killing. Defendant and McKinney sometimes spoke when they met, and sometimes they did not. Crenshaw and defendant lived near each other and spent much of their time together. Defendant knew where McKinney lived. He did not speak to McKinney, nor McKinney to him, on the day of the killing. When McKinney, sitting on his horse in the position heretofore stated by witness, called Crenshaw to him, he, Crenshaw, stepped forward, cocked his Winchester, and, the witness thought, then let the hammer down, and approached McKinney with the Winchester in a position to shoot. McKinney could see all that Crenshaw did, but neither he nor witness said anything. Defendant was looking towards witness when he asked witness, the second time, in the loud tone of voice for the chew of tobacco. Just before witness threw the tobacco to defendant, he heard Crenshaw's voice—or he took it to be Crenshaw's—say: "What is the matter, Charley?" and the shooting commenced. Judging from the circumstances, and the manner in which defendant last asked for the tobacco, it was the witness's solemn belief that the defendant's said request to witness was the signal to Crenshaw to shoot McKinney. Crenshaw fired the first shot, killing McKinney, and almost simultaneously defendant fired the shot that wounded witness. Witness did not see either Crenshaw or defendant when the shot was fired from the house. The said shot came from the south side of the house. Witness could not see into the house. He had never been in it, and knew nothing about its interior arrangement. He could say nothing about an opening, whether door, window or cracks, on the south side. The only opening he saw was on the west side, facing Twohig.

Further cross examined, the witness said that he was unable

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now to state whether the conversation in Butler's saloon with defendant, as detailed on direct examination, occurred before or after the election. George Gerdner, John Butler, Foster Cope, McMullen, George Salmon, Justice Howard and the bar tender were present at the time of that conversation. Justice Howard had since died. Defendant uttered no threats in the conversation he had with witness in Twohig, a few minutes before the killing. Benito Santos, who lived in the neighborhood of White's ranch, and who was going home, was going to pilot witness and McKinney to White's ranch. McKinney, witness and Santos were all armed, the latter with a Winchester. The wagon road from Twohig to White's ranch did not lead by defendant's house. A trail only led from Twohig to the said ranch, *via* defendant's house. The witness thought it strange that Crenshaw should cock his gun on starting to McKinney, but, as McKinney said nothing, he did not. He could not say that McKinney observed Crenshaw cock the gun. The witness could not say that he did or did not attempt to draw his pistol when Crenshaw fired the first shot. He did try to draw it immediately after he was shot by defendant. The witness testified on the examining trial of this defendant. He did not testify on that trial to the threats uttered by defendant in Butler's saloon because, having previously told the district attorney and Mr. Nott of those threats, they both advised him to withhold that part of his testimony for the final trial in the district court. Witness stated in his testimony on the examining trial that he did not suppose that defendant and McKinney loved each other. He also testified that he thought defendant's last request to him for tobacco was the signal for Crenshaw to shoot McKinney. When he gave that testimony defendant said to him, in the presence of the justice of the peace: "You are telling things to suit yourself any way; why don't you swear it?" Witness thereupon drew his pistol, called the defendant a damned son of a bitch, and charged him with "putting up the job by which Charley McKinney was murdered." The witness stated that the defendant was then in arrest, and that, for that reason he, witness, would like to be permitted to give a satisfactory explanation of his conduct on that occasion, the fact being that he drew his pistol more on account of old Jesse Laxon, the uncle of defendant, who, at the time, was sitting by the defendant, armed. The witness communicated to McKinney, before the fatal day, the threats uttered by defend-

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ant in Butler's saloon. The killing of McKinney created a great deal of excitement in La Salle county, and had the defendant or Crenshaw fallen into the hands of some of the citizens they would undoubtedly have been lynched. They were, however, perfectly safe from lynching in the hands of the officers of the county. It was true that parties had been taken from jail in Cotulla and hung without judge, jury or trial, but in every such case they deserved hanging.

On re-examination, the witness was directed to detail, circumstantially, the episode in the examining trial, of which he had spoken. He stated that while he was on the stand on that trial and throughout the entire trial, Jesse Laxon, the reputed uncle of defendant, sat by defendant's side. The witness knew that Laxon was armed, because he saw his hand under his coat and on the handle of his pistol. He had not disarmed Laxon, because he knew Laxon to be a deputy sheriff of Dimmitt county, and authorized to carry a pistol. When the witness testified that he believed defendant gave the signal, as testified here, for Crenshaw to shoot McKinney, defendant said: "Why don't you swear it; you are telling things to suit yourself anyway?" The witness then distinctly saw Laxon partially raise up and attempt to draw his pistol. Witness did not propose to sit there unarmed, under the circumstances, and accordingly he drew his pistol on Laxon more than on defendant, and kept his eye on Laxon while he replied that defendant was the "damned son of a bitch who put up the job to murder Charley McKinney; that he, defendant, was and had always been a thief and an outlaw." Bill Johns and others caught witness, and Laxon left.

Dr. Bain testified, for the State, that on the morning of December 26, 1886, Mrs. Gallaway, who lived near Twohig Station in La Salle county, came for the witness to go to her house to make a surgical examination of her daughter, who, it was charged, had been recently ravished. The witness got on the train for Twohig on that day, and when near Twohig got in company with McKinney and Edwards, who told him they were en route to Mrs. White's ranch to arrest Dow White for the alleged rape of Miss Gallaway. When the train reached Twohig the witness saw the defendant, whom he knew, standing on the platform. Edwards and defendant met on the platform, spoke to each other and shook hands in a friendly manner. Within a short while the witness saw Crenshaw in town.

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He and defendant got together, and shortly rode off together toward the defendant's house, which was situated about a quarter of a mile east of Twohig Station. As they crossed the railroad they passed Captain McKinney, who was then in conversation with Mr. Stewart. After reaching a point about twenty-five or thirty yards beyond McKinney, Crenshaw turned and rode back. As he started back, defendant said to him: "Come on, Bud." Crenshaw motioned his hand behind him at defendant, approached McKinney and said to him: "How are you, Charley?" McKinney replied: "How are you, Bud?" shook hands with him and asked him: "How did you spend Christmas?" Crenshaw replied: "I had a fine time; got drunk, but am sober now." After a few more words of conversation, Crenshaw turned and went back to defendant, and the two rode off towards the defendant's house. Both the defendant and Crenshaw had guns on their saddles.

Witness, McKinney and Edwards, after remaining in Twohig about three quarters of an hour, secured horses and got a Mexican named Santos as a guide, and started to the White ranch. Between the depot and defendant's house McKinney said that he was afraid that defendant and Crenshaw would warn White that he was being searched for, and that if he did not find White at defendant's house, he was going to add Crenshaw to his posse and take him along. McKinney and his party, including the witness, instead of taking the regular road to White's ranch from Twohig, took the path or trail that led by defendant's house. When the party reached a point within fifty or sixty yards of defendant's house, the witness observed defendant and Crenshaw walk from the west side of the house to the south side, whence they disappeared around the east side. McKinney's party was traveling east. A very few moments later the witness saw defendant and Crenshaw sitting down near together on the east side of the house, with their Winchester guns across their laps. McKinney said to witness: "You and Santos go on; I will overtake you presently." Witness and the Mexican rode on slowly. Edwards stopped near defendant. McKinney said to Crenshaw: "Bud, come here; I want to see you a minute," and rode to a point about thirty yards distant from defendant and Edwards. Witness, riding along slowly, observed Crenshaw and saw him get up, start towards McKinney with his gun grasped in both hands, the muzzle pointing towards McKinney. He cocked

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his gun as he advanced, and took his position at the side of McKinney, with his gun in a position to shoot McKinney, which position he maintained until he did fire the fatal shot. McKinney was leaning forward, with his right elbow resting on his horse's neck, and his head resting on his right hand. His pistol was in the scabbard, belted around his body. He had gloves on his hands and had nothing in his hands. According to witness's recollection, both of McKinney's feet were in the stirrups. When witness and Santos reached a point about sixty yards distant from McKinney and Crenshaw, witness saw Crenshaw thrust the muzzle of his gun to McKinney's face or chin and fire at McKinney, who was maintaining the position described. Almost instantly another shot was fired about the place where the defendant was when witness last saw him, which place witness could not see at that moment, because of Edwards's horse. When this shot was fired, Edwards's horse whirled around, and at least one more shot was fired from the blanket on which defendant was sitting when witness last saw him. It was the second shot fired from the blanket, as indicated by the course of the wound and the movement of Edwards's body in the saddle, that struck Edwards. Witness saw a second shot fired into McKinney's body by Crenshaw, and afterwards saw four wounds in McKinney's dead body, either one of which was necessarily fatal. When witness, who left the scene immediately upon the firing of the shots described, reached Twohig, he found Edwards already arrived, wounded in the manner described by him (Edwards). The witness heard seven shots fired, four of which he saw. He did not hear anything said by McKinney or Crenshaw after McKinney called Crenshaw. He did not hear defendant ask Edwards for tobacco. He did not see McKinney either draw or attempt to draw a pistol. The witness saw two horses, saddled and bridled, at the northeast corner of defendant's house. They were the same horses ridden by defendant and Crenshaw in Twohig. McKinney's face and wrist were blackened by powder-burn.

On his cross examination the witness said that McKinney was killed by the first shot fired by Crenshaw. It was understood by the witness that if Dow White was not found at defendant's house, the party was to go on to White's ranch, taking Crenshaw along as a part of the posse. Witness and the Mexican rode forward when directed by McKinney to do so,

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and had just checked their horses to wait when the first shot was fired. The witness saw but one opening to the defendant's house or "jacal," and that was on the west side, looking towards Twohig.

Benito Santos testified, for the State, that in December, 1886, he lived near the White ranch, in La Salle county, Texas. He met Captain McKinney and Mr. Edwards in Twohig on the evening of December 26, 1886, and was employed by them to guide them to the White ranch. Dr. Bains was with them. The witness saw the defendant and Bud Crenshaw, the latter of whom he had never seen before, in Twohig on the same evening. When McKinney's party, including witness, started from Twohig to White's ranch, they took the trail *via* defendant's house, which was the nearest route to the said ranch. The defendant's house stood about ten steps from that trail. When the party got within about one hundred yards of defendant's house, the witness saw the defendant going from the brush towards his house. He was alone and on foot,—walking on his crutch—and had no gun, and so far as the witness could tell, no pistol with him. Crenshaw was then on the east side of the house, where the defendant joined him. As the party came in view of defendant and Crenshaw on the east side of the house, the witness observed a carbine gun leaning against the house near them. About that time Captain McKinney told Dr. Bains and witness to ride on, and he and Edwards stopped. When witness and Dr. Bains had gone a short distance, witness looked back and saw Captain McKinney and Crenshaw talking to each other. Crenshaw was standing by the side of McKinney's horse, and McKinney was sitting on his horse in the position stated by the witness Edwards. He had a pair of buck-skin gloves on his hands, and in one hand held a small riding whip which the witness loaned him a few minutes before. He had nothing but the whip in his hands. The witness and Dr. Bains rode forward slowly, and when they had reached a point about seventy yards distant from the parties, witness heard defendant in a loud voice ask Edwards for a chew of tobacco. In an instant and almost simultaneously two shots were fired. Witness looked back and saw Captain McKinney falling from his horse, Crenshaw preparing to shoot again, defendant leaning against the house, and smoke ascending from the place where he stood. Crenshaw shot McKinney the second time as he fell off his horse, and twice after the body had

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fallen. As the witness left the scene he saw Crenshaw and defendant disappear behind the house. He saw but one horse at the defendant's house, and that was the horse ridden by defendant from Twohig.

Cross examined, the witness said that the trail by defendant's house led into the White's ranch road through the brush. He did not hear Captain McKinney, when the party left Twohig, say that he would have to go by defendant's house. In approaching the said house over the said trail, the party rode in single file, Edwards in advance, McKinney next, Doctor Bains next, and witness in the rear. Witness thought that McKinney and Edwards could have seen defendant approaching the house from the brush as well or better than he could. The witness was positive that Crenshaw and defendant were not sitting on a blanket when he, witness, reached the house, and that defendant was standing on his crutch against the house, talking to Edwards, with no gun in his hands, when witness and Doctor Bains rode forward, as directed by McKinney.

W. Gallaway was the next witness for the State. He testiged that he lived in LaSalle county, about seven miles distant from Twohig station. He was not related to defendant, but had known him about eleven years. He could not say how long he had known Crenshaw when he, Crenshaw, was killed resisting arrest. When killed, Captain McKinney had just been elected sheriff of LaSalle county for the third term. Defendant used to divide his residence between the houses of the witness and John DeSpain. About the time of the general election in November, 1886, the defendant asked the witness to help him decoy and kill Captain McKinney. That proposition was made to witness by the defendant at defendant's house, in the presence and hearing of W. O. Tompkins and a Mexican named Fumicina Garcia. He had twice before made the same proposition to the witness, once during the term of the district court in Cotulla in 1885, and again about two weeks after the adjournment of that term of court. The witness at no time agreed to help him decoy or kill Captain McKinney, but, on the contrary, positively and absolutely refused. Witness saw the defendant at night, about two weeks after the killing of McKinney. He came to witness's house on that night to get some provisions. He was on horseback, and, witness supposed, was armed. Witness saw him again on the next day in the brush, about

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three miles distant from witness's house. He was then lying in the brush, waiting to be supplied with provisions. On that occasion defendant told witness that he, defendant, shot Pete (Edwards), and that Crenshaw shot McKinney, who fell off his horse like a turkey gobbler. He assigned no reason for shooting Edwards, nor did he say why Crenshaw killed McKinney. Witness sent word to Captain Schmidt, of the Texas ranger force, that defendant was in his, witness's, neighborhood, and that he could arrest defendant by watching his, witness's, house.

Cross examined, the witness said that, when he saw defendant at his house and when he took provisions to defendant in the brush, he knew that defendant was accused of the murder of Captain McKinney. The officers in Cotulla asked witness to obtain information for them as to the whereabouts of defendant, and he sent them word that they could find defendant by watching his, witness's, house. The witness did not get mad when defendant proposed the assassination of McKinney to him. Witness and defendant had always been friends, until the killing of McKinney, at which time the witness's feelings towards defendant changed. He had always opposed Captain McKinney in elections, but his feeling towards both McKinney and defendant changed at the death of McKinney, from the fact that McKinney lost his life in going to the defense of the witness's family in the absence of the witness. White had been charged with the rape of the witness's daughter, the witness being away from home at the time, and McKinney was on his way to arrest White when he was killed. Witness was about sixty miles away from home on the day that McKinney was killed, and did not know of the killing nor of the rape of his daughter until he got back home. The witness never told McKinney of the propositions made to him by defendant to kill him, McKinney. The reason why witness furnished food and shelter to defendant after the killing of McKinney was that he thought the defendant could furnish or suppress evidence against Dow White for the rape of witness's daughter. Witness attended the trial of Simpson DeSpain, in Frio county, and remembered meeting Mr. Haltom (attorney for defendant) at that trial, and remembered that he went to Haltom and inquired after "*mia compadre*"—meaning the defendant; and that he told Haltom to tell defendant that he, witness, could do nothing for him until after the trial of Dow White, when

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he, witness, would go to his, defendant's, assistance. The witness sent that word to defendant by Haltom, to keep defendant's people from working against him in the Dow White case;—notwithstanding which fact, his people did help White. White was in jail when witness took the food to defendant in the brush. On that occasion the defendant told witness that he had been hiding in Hill's pasture. He did not say where Crenshaw then was, nor did he then or at any other time tell witness that he signalled Crenshaw to shoot McKinney, by asking Edwards for some tobacco. Witness first divulged the facts to which he has now testified after the acquittal of Dow White.

Mr. McInest testified, for the State, that he lived in Twohig at the time of the tragedy, and heard the firing of the fatal shots. He and Mr. George Knaggs reached defendant's house about fifteen or twenty minutes later. They found McKinney's body, with arms extended, lying on the ground about thirty steps from the house. McKinney had his buckskin gloves on, and his pistol was in the scabbard belted around his body.

Captain George H. Schmidt testified, for the State, that he was captain of a company of State troops in December, 1886. On the twenty-eighth day of December, 1886, he was ordered to La Salle county. He reached Cotulla on the twenty-ninth day of that month, when Captain R. P. Fly, who had been appointed sheriff to succeed Captain McKinney, delivered to him warrants for the arrest of Crenshaw and defendant. Witness and five men raided the county several times in search of the defendant and Crenshaw. About the middle of January, 1887, the witness learned that Crenshaw was in the Summers pasture, and knew that defendant was not far away from Crenshaw. He and his men accordingly waylaid a trail over which witness presumed the parties would pass in quest of water. After several days waiting, two men, who proved to be Crenshaw and W. O. Tompkins, appeared on the trail in the distance. Witness stationed his men in a manner to entrap the parties. When they reached a certain point on the trail witness stepped into the trail and ordered Crenshaw to surrender. Tompkins also called to him to surrender. Instead of doing so, Crenshaw drew his pistol and fired, and was immediately shot down by witness's men. Tompkins fled and Crenshaw soon died. The witness at that time knew where the

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defendant was, but expected him at that particular hour to be with Crenshaw. Defendant afterwards surrendered, being brought in by his brother.

Cross examined, the witness said that after his surrender the defendant expressed great fear of being mobbed, but witness did not think he was as afraid of the people of Cotulla, as those people were of him. Great excitement prevailed in Cotulla. Mr. Hill was afterwards killed. Defendant's surrender was opportune as he could not have avoided capture. He knew the thickets better than his pursuers, but was hemmed in and worn out.

The State closed.

George Knaggs, postmaster at Twohig, was the first witness for the defense. He testified as McInest did about going to defendant's house after the shooting, and finding McKinney's body, and further that, as was his daily custom, defendant came to the post office on the fatal day just after the train passed through and asked for letters which the witness knew he had reason to expect by that mail. Defendant was at the depot when McKinney reached Twohig on that evening. It had always been defendant's custom since witness had known him, to carry a Winchester rifle or carbine. When he came to Twohig he generally left his gun in witness's store until leaving town. Witness did not remember seeing defendant with a gun on the fatal day. Defendant's house had but one opening —the door on the west side. The road to White's ranch did not pass defendant's house. Witness saw McKinney alone in Twohig several times after the election of 1886. Witness did not remember seeing defendant and Crenshaw together on the fatal day.

Willie Hill testified, for the defense, that the road from Twohig to White's ranch did not pass by defendant's house. A path led towards that road as far as defendant's house, but beyond that one would have to go through the brush to get to the said road.

Cross examined, the witness said that Bud Crenshaw was his uncle, and at the time McKinney was killed, lived at his, witness's, father's house. He left that house to go to Twohig, about three o'clock on the evening of the murder of McKinney. He came back to the house late that evening after the killing, defendant being with him. Defendant said that Crenshaw killed McKinney, but at that time said nothing about Edwards.

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They remained at the house a very short while, and then left, as they came, on horse back, taking Winchesters and pistols with them. The witness afterwards, on one or two occasions, saw Crenshaw in the brush, on which occasions he told witness that he killed McKinney. Witness never saw defendant in the brush after the killing. Witness did not tell the officers that they could find Crenshaw in the brush. He did not consider the arrest of Crenshaw any business of his, and so far as he was concerned, he decided to let the officers find Crenshaw if they could.

A. J. Evans and *Ed. Haltom*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

Hurt, Judge. This is a conviction for murder of the first degree, with the death penalty.

At the May term, 1887, of the district court of La Salle county, appellant was indicted for the murder of C. B. McKinney. On the thirteenth day of May, 1887, the court of its own motion made an order, changing the venue of the case to the district court of Bexar county. When this order was made, appellant objected to the case being sent to Bexar, that county being out of that judicial district. The learned judge filed reasons for sending the case out of his district; which reasons are quite satisfactory. (See art. 576, Code Crim Proc.)

On the trial the State, over objection, proved by S. V. Edwards that, about two or three weeks before McKinney was killed, defendant McCoy told the witness, in the presence of others, in Butler's saloon, in Cotulla, La Salle county, that if C. B. McKinney ever came to Twohig he had better come shooting, as he intended to kill him, etc. Counsel for appellant objected because these threats did not tend to prove appellant a principal actor in the murder of McKinney, or to show a conspiracy with Bud Crenshaw to kill him, the fact being that Crenshaw was the actual perpetrator of the crime.

Appellant was present when Crenshaw killed deceased, and these threats were introduced as cogent facts in corroboration of the attending circumstances which established that there was not only a conspiracy to murder deceased, but also that Crenshaw and appellant acted in concert in the killing of McKinney. These observations apply to the competency of the

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testimony of the witness Gallaway. That Gallaway was an accessory is no objection to the competency of this testimony.

Upon cross examination of the witness Gallaway, counsel for appellant asked him: "Were you not a witness in behalf of Simpson De Spain, a nephew of the defendant, when De Spain was tried for murdering a Mexican, and did you not voluntarily testify in behalf of De Spain; and, after you charged Dow White with raping your daughter, did you not endeavor to get this defendant, Jim McCoy, to procure false testimony against said Dow White, which he refused to do?" Counsel for the State objected because of irrelevancy. The objection was sustained and appellant reserved a bill.

"A witness can not ward off answering a question *material to the issue* on the ground that it imputes disgrace to himself, if such disgrace does not amount to crimination." This is the doctrine as stated by Wharton. (Crim. Ev., sec., 473.) "A witness may, upon cross examination, be asked whether he has been in jail, in the penitentiary, or State prison, or any other that would tend to impair his credibility." The facts proposed to be proved by this witness not being material to any issue in the case, the court acted properly in excluding them.

When Edwards related the threats, etc., made by the appellant, his counsel moved to postpone the trial because surprised by this testimony. It appears that Edwards had testified before the examining court, but had not mentioned these threats. He states that these threats were made in the presence of several persons, naming them. The threats were that in the presence of Foster Cope, Geo. Salmon and Tom Gerdner, at Cotulla, defendant told the witness Edwards that if McKinney ever came to Cotulla he had better get off the train shooting or he would never get away alive. In this there is no threat in *terms* to kill deceased.

Now appellant moved to postpone to procure the attendance of Cope, Salmon and Gerdner to prove that they "were never present at the time when he, defendant, threatened to *kill* deceased, or said if he, deceased, ever came to *Twohig* he had better get off the train shooting." Edwards swears that defendant said if McKinney came to Cotulla, etc. Appellant swears that he could prove by Cope, Salmon and Gerdner that defendant never said that if McKinney came to Twohig, etc. Edwards did not swear that defendant stated to him that if

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McKinney should come to Twohig he had better get off the train shooting. Hence what appellant proposed to prove by Cope, Salmon and Gerdner might be true and still Edwards would not be contradicted or impeached in any manner. There was no error in refusing to postpone.

The court did not err in refusing to charge the law of murder of the second degree. Crenshaw killed McKinney, and if appellant is criminally responsible at all for the homicide, the grade of the offense under the facts is not short of murder of the first degree.

At the request of appellant the court gave this charge to the jury:

"The defendant asks the court to charge the jury that before you are authorized to find defendant guilty, you must believe from the evidence, and the evidence alone, and beyond a reasonable doubt, that the defendant either shot and killed the deceased, C. B. McKinney, or was present acting with some one else in the killing of McKinney. Therefore, if you find from the evidence that one Bud Crenshaw shot and killed C. B. McKinney, and that such killing was with express malice as defined in the general charge, and that immediately afterwards the defendant shot at, and shot, S. V. Edwards, and that this was the same time and place of the shooting of deceased, McKinney, and that the defendant did not shoot at C. B. McKinney, or offer any violence towards the deceased, then, before you would be authorized to find this defendant guilty, you must believe from the evidence, beyond a reasonable doubt, either that this defendant and Bud Crenshaw had previously entered into an agreement to kill the deceased, C. B. McKinney, and the deceased was killed in pursuance of such agreement, while the defendant was there present, or that Bud Crenshaw shot and killed McKinney, and that the acts of the defendant were enacted for the purpose of aiding or abetting the said Crenshaw in the killing of said McKinney. And if you should find from the evidence that one Bud Crenshaw shot and killed the deceased, and that all that was then done by the defendant was to shoot S. V. Edwards, then before you could find this defendant guilty you must find from the evidence, beyond a reasonable doubt, that the shooting of Edwards was done for the purpose of aiding or abetting said Crenshaw in the killing

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of C. B. McKinney, before you would be authorized to find the defendant guilty.

"J. M. ECKFORD,
"TEEL & HALTOM.

"The foregoing charge is given in subordination to the general charge regarding principals.

GEO. H. NOONAN,
"*Judge.*"

There was no objection at the time to the qualification, viz: "The foregoing charge is given in subordination to the general charge regarding principals,"—the objection being urged first on the motion for a new trial. This being the case, was the qualification calculated to prejudice the case of appellant?

In passing upon the question of injury *vel non*, or probable injury resulting from a positive error or omission in the charge, the whole record must be looked to: 1. The charge as a whole; 2. The statement of facts. The learned judge, in the charge already given, had clearly and concisely hinged appellant's guilt upon the fact as to whether he was present and, knowing the unlawful intent of Crenshaw, aided and encouraged him in the killing, or whether the appellant had advised or agreed to the offense and was present when the same was committed.

Appellant's requested charge, above, is predicated upon the theory that Crenshaw shot and killed McKinney, unaided by him in any manner. That the killing of McKinney was a distinct transaction from that between appellant and Edwards; that, if this theory of the case is not shown to be true, it is left in doubt, and should have been submitted to the jury in a clear, simple and affirmative charge, without qualification, or being subordinate to any other charge. This is a strong position and if sustained by the evidence, or the weakness of the State's case, should be ground for a reversal of the judgment.

As Crenshaw killed McKinney, it devolved upon the prosecution to prove beyond a reasonable doubt: 1, that Crenshaw and appellant acted together in the killing of McKinney; or, 2, that appellant was present; that he knew of the purpose of Crenshaw to kill deceased, and with this knowledge he aided

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by acts or encouraged by words or gestures Crenshaw in the commission of the murder; or, 3, that Crenshaw and appellant had agreed with each other to kill McKinney, and that appellant was present when Crenshaw shot and killed the deceased. To convict, one of these propositions must be shown beyond a reasonable doubt, and if from the weakness of the testimony relied upon to establish these propositions there is a shade of doubt as to the existence of the one most strongly supported by the State's testimony, then there might have been injury to the rights of appellant by the qualification appended to the charge under discussion. We must therefore look to the facts.

Looking to the facts bearing upon this question, the most shadowy, gauzy veil of a doubt does not remain. Our judgment is perfectly clear and satisfied beyond any sort of doubt or misgiving as to the truth of each of the propositions, namely: that the appellant and Crenshaw acted together in the murder of C. B. McKinney; that it was thoroughly agreed between them before the deceased and Edwards reached appellant's house that McKinney should be killed. Each knew minutely the part to be performed by him, and executed it with precision and fatally to deceased.

Under this state of case, if the learned judge had refused to submit to the jury the requested instructions (those given with qualification), in the absence of exceptions for the omission or refusal, we would not be warranted in reversing the judgment. Other objections were made to the charge in the motion for new trial, but we are of opinion that none are well taken.

If correct in the above observations as to the facts of this case, it is unnecessary for us to discuss the sufficiency of the evidence to support the conviction.

Appellant has been awarded a just, cautious and fair trial. His triers have convicted him of one of the most heinous crimes known to our laws, inflicting upon him the most terrible punishment. While this is true, a moment's reflection, carrying him back to the scene of the deliberate, bloody assassination of C. B. McKinney, will convince him that he is the author of his present calamities and fearful doom.

Finding no error in the judgment, it is affirmed.

Affirmed.

Opinion delivered February 20, 1889.

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ON MOTION FOR REHEARING.

HURT, JUDGE. The only ground upon which this motion is based and urged in the able oral argument of counsel for appellant is a supposed error into which we have fallen with regard to appellant's motion at the trial for a postponement of the same to enable him to procure the attendance of witnesses to contradict the witness Edwards as to threats made by appellant against the deceased. We discussed the subject from the statement in the bill of exceptions itself. The bill of exceptions states that the threat or supposed threat was to be executed when McKinney, the deceased, should get off the cars at Cotulla. It is urged that a clerical mistake has occurred in preparing the bill, and that in fact Twohig, and not Cotulla, was the place named by the witness Edwards, and we are referred to other portions of the record in substantiation of this assertion. We are satisfied upon a re-examination of the record that the mistake in the names of the two places has occurred as stated—that Twohig must have been the place stated by the witness.

But, conceding this to be true, the sole object of the proposed testimony was to contradict the witness as to threats made by appellant against the deceased at the time and place mentioned. Suppose that evidence had been adduced, or that it could be adduced on another trial, is it at all likely or probable that it could or should have any effect in changing the result? This is the question, and the only pertinent question, as the matter is now presented to us.

Viewed in the light of other testimony at the trial, we think the proposed testimony could have had no possible weight in changing the result. The witness Gallaway testified most positively, locating time, place and parties present, not only to threats made by appellant against McKinney, but to the fact that appellant tried to get him, witness, to aid and assist him in the killing. These threats, according to that witness, were made more than once. This witness's testimony is not contradicted or attempted to be contradicted by Tompkins or Garcia, the parties stated by him to be present at the time these threats were made. If it was necessary to prove previous threats on the part of defendant, then this witness's testimony abundantly proves threats of a more hostile character than those testified to by the witness Edwards. How, then, could the dis-

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proving of Edwards's statement affect the uncontradicted statement of Gallaway that defendant made the threats about which he testifies? We are clearly of opinion that the proposed testimony could not affect the result of another trial on account of this matter of threats.

We have found no reason, upon a mature reconsideration of this record, why our former affirmance of the judgment should be set aside, and the motion for rehearing is, therefore, overruled.

Motion overruled.

Opinion on the motion delivered March 23, 1889.

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COURT OF APPEALS OF TEXAS.

AUSTIN TERM, 1889.

27 43
29 37

No. 6215.

A. D. MOORE *v.* THE STATE.

NEGLECT OF OFFICIAL DUTY—DILIGENCE.—In order to warrant the conviction of an overseer of a public road for failure, neglect or refusal to perform the duties of his office, it devolves upon the State to show that such failure, neglect or refusal on his part was wilful—that is, with evil intent, with legal malice, without legal justification, and with no reasonable ground to believe his action legal. Such overseer is charged only with reasonable diligence and effort in the discharge of his duty, and can not be held criminally responsible for failing to keep his road in repair, when it is shown that to do so with the means available to him is an impossibility. If he exercised reasonable diligence and effort, no wilful failure, neglect or refusal to discharge his duty can be imputed to him.

APPEAL from the County Court of Wilbarger. Tried below before the Hon. T. W. Robinson, County Judge.

The appellant in this case was convicted for failing, as the overseer of road precinct number ten, of Wilbarger county, to keep the public roads in repair, and his punishment was assessed at a fine of twelve and a half dollars.

The proof for the State and the defense concurs in showing that the appellant was placed in charge of from twelve to fourteen miles of public road, and that not more than from twelve to fourteen hands were apportioned to him to keep the said roads in repair; that the force thus apportioned to him was wholly inadequate to perform the labor allotted to him, and that, under the circumstances, it was utterly impossible for the appellant to keep the said roads in repair.

H. C. Thompson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

WILLSON, JUDGE. To render an overseer of a public road guilty of an offense under article 409, of the Penal Code, his failure, neglect or refusal to perform the duties imposed upon him as such overseer must be *wilful*—that is, with an evil intent, with legal malice, without reasonable ground for believing such failure, neglect or refusal to be lawful, and without legal justification.

In this case the evidence, in our opinion, does not warrant the conclusion that the defendant wilfully failed, neglected or refused to perform his duties as overseer. While he did not compel all the hands apportioned to him to work the full time prescribed by law, he did work some of them the full time, and others a portion of the time, and the evidence conclusively shows that, if he had caused all of the hands to work the full time, it would have been impossible, owing to the length and bad condition of the road, and the small number of hands, to have kept said road in good repair. The law does not require impossibilities, and to hold, under the facts of this case, that the defendant is guilty of an offense because he failed to keep said road in repair would be holding him criminally responsible for failing to perform an impossibility.

All that should be required, and all the law intends to require, is reasonable diligence and effort on the part of an overseer to perform the duties enjoined upon him, and what will amount to such reasonable diligence and effort must be determined by the facts of each particular case. If reasonable diligence and effort be exercised, there can be no *wilful* failure, neglect or refusal to perform duty.

In our judgment the evidence in this case does not show a wilful failure, neglect or refusal by defendant to perform his duties as overseer of the road, and we therefore set aside the conviction and remand the cause for a new trial.

Reversed and remanded.

Opinion delivered April 5, 1889.

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No. 6195.

J. C. CHANCE v. THE STATE.

INDICTMENT OR INFORMATION FOR THEFT is fatally defective if it fails to charge directly that the *taking* of the property was *fraudulent*. Such allegation is not supplied by the subsequent allegations that the taking was with the fraudulent in ent to deprive the owner of the value of the property, and fraudulently to appropriate the same, etc.

Appeal from the County Court of Denton. Tried before the Hon. S. M. Bradley, County Judge.

This conviction was for misdemeanor theft, and the punishment awarded by the jury was a fine of twenty-five dollars and confinement in the county jail for a period of one month.

The record brings up no statement of facts; nor does the ruling on appeal require a statement of the case.

Jagoe & Ponder, for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Theft is the "*fraudulent taking* of corporeal personal property," etc. (Penal Code, art. 724.) An indictment or information for this offense which does not directly charge that the *taking* of the property was *fraudulent* is fatally defective. A failure to so charge is not supplied by the allegations that the property was taken with the fraudulent intent to deprive the owner of the value of it, and with the fraudulent intent to appropriate, etc. (Willson's Cr. Stat., sec. 1254.) In this case the information does not allege that the property was *fraudulently taken*, and the defendant's motion in arrest of judgment based upon such defect should have been sustained; wherefore the judgement is reversed and the prosecution is dismissed.

Reversed and dismissed.

Opinion delivered April 5, 1889.

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No. 6219.

WILLIAM JAMISON *v.* THE STATE.

UNLAWFULLY PULLING DOWN A FENCE, ETC.—The proof shows that the defendant was the sole owner of a dividing fence between his farm and the farm of one McN.; that, without notice to McN. in writing, he pulled down the said dividing fence, exposing McN.'s growing crops to the depredations of stock; that McN., to protect his crops, again connected his fence to the defendant's fence on the defendant's land, when the defendant again pulled it down. *Held* that, although the sole owner of the dividing fence, the defendant had no right to remove it without having given McN., his agent or attorney, notice in writing of his intention to do so for at least six months prior to so doing. McN., in connecting his fence with that of the defendant, for the purpose of preventing stock depredations on his growing crops, notwithstanding the connecting point was on the defendant's land, was not a trespasser and violated no law. (See Laws of 1887, page 30.)

APPEAL from the County Court of Cooke. Tried below before the Hon. J. E. Hayworth, County Judge.

The opinion sufficiently discloses the case. The penalty assessed against the appellant was a fine of twenty dollars.

R. V. Bell, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Although the defendant was the sole owner of the fence dividing his farm from the farm of McNeill, he could not lawfully withdraw or separate said fence from the adjoining fences of said McNeill, without first having given said McNeill, his agent or attorney, notice in writing of his intention to do so for at least six months prior to the time of so doing. (Act March 17, 1887, p. 30, sec. 2.)

In this case the record fails to show that such written notice was given, and therefore the defendant acted in violation of law and of the rights of McNeill in removing said division fence. By such removal the growing crops of McNeill were exposed to the depredations of stock, without notice to him. Finding his crops thus suddenly and unexpectedly exposed to

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Syllabus.

the danger of destruction, McNeill had the legal right to avert the danger by again connecting his fence with the fence of the defendant, and in so doing, did not violate the law, and can not be regarded as a trespasser, although the connecting portion of his fence was on defendant's land.

The intention of the law is to protect growing crops from depredation, and such intention would be defeated in this instance if we were to hold that the defendant, by his wrongful, illegal act of removing the division fence, could deprive McNeill of his right to again connect his fence to said division fence for the purpose of protecting his crops. (Wilson's Cr. Stat., sec. 1179.) As we understand the purpose, spirit and intent of article 684 of the Penal Code, the defendant violated said article by pulling down the portion of fence erected by McNeill for the purpose of closing the gap in his inclosure, caused by the removal of said division fence.

This being our view, other questions presented in the record are immaterial, and are therefore not determined. The judgment is affirmed.

Affirmed.

Opinion delivered April 5, 1889.

No. 6179.

WILLIAM SHELTON *v.* THE STATE.

27 443
39 193

1. COMPLAINT—INFORMATION—VARIANCE.—The complaint alleges that the offense was committed on the sixteenth day of January, 1888; the information that it was committed on the eleventh day of January, 1888. *Held*, that the variance is immaterial.
2. SAME.—VERDICT reads: "We, the josurys, find the defendant gilty," etc. *Held*, that the words incorrectly spelled constitute no material defect.
3. CARRYING A PISTOL—EXEMPTION AS "A PERSON TRAVELING"—PRACTICE.—Whether the accused was "a person traveling" and therefore exempt from the operation of the statute denouncing the offense of carrying a pistol, is a question of fact for the determination of the jury.
4. SAME.—A FUGITIVE FROM JUSTICE, while fleeing the country, is not "a person traveling," within the exception of the statute forbidding the carrying of a pistol.
5. SAME—VENUE.—Proof of the venue as alleged is essential to a legal conviction for crime.

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Opinion of the court.

Appeal from the County Court of Montague. Tried below before the Hon. Griffin Ford, County Judge.

The appellant was convicted for unlawfully carrying a pistol on his person, and his punishment was assessed at a fine of twenty-five dollars and confinement in the county jail for twenty days.

The proof shows that while in attendance upon a dance at a place known as Eagle Point, the defendant was informed that an officer was en route to said dance to arrest him. He and another person thereupon mounted a horse and went to Nocona, where defendant boarded a train and went to Childress county. Between Eagle Point and Nocona he drew and discharged a pistol.

Stephens & Herbert, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It was not error to overrule the motion in arrest of judgment. There is no material variance between the complaint and the information, and there is no material defect in the verdict.

Whether or not the defendant, at the time he carried the pistol, was "a person traveling" was a question of fact for the determination of the jury, and this issue was fully and fairly submitted to the jury by the charge of the court. We are of the opinion that the evidence warranted the jury in finding against the defendant upon said issue. It was shown that at the time defendant carried the pistol he was fleeing from the officers of the law to evade arrest. It is not the intention of the law to license fugitives from justice to carry arms. They are not "persons traveling," within the meaning of the exception in the statute.

There is no proof in the record of the venue of the offense, and, therefore, the conviction must be set aside. This error is confessed by the Assistant Attorney General. The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered April 10, 1889.

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Syllabus.

No. 6233.

J. S. STILLY v. THE STATE.

27 445
33 304
34 102

1. CARRYING A PISTOL—"A PERSON TRAVELING" is a person exempt from the operation of the statute defining the offense of unlawfully carrying a pistol. It is shown in this case that the defendant, with his family in a wagon, left his home in the Indian Territory to go to B , in Cooke county, Texas, via G. in the same county; that he arrived at G. after night and stopped at a wagon yard, where he left his wagon and family, to go into town for the declared purpose of hiring a conveyance to continue his journey that night, but that he was arrested in a gambling room on that night with a pistol on his person. *Held*, that while en route from the Indian Territory, and while in the wagon yard in G., and while on the streets of G. to procure a conveyance, or for any other lawful purpose connected with his journey, he was "a person traveling" within the meaning of the statutory exception, but such exception can not be held to protect him while frequenting the gambling room.
2. SAME—PRACTICE—BURDEN OF PROOF.—When the State has established against the accused a *prima facie* case of guilt, it devolves upon the accused to establish the facts upon which he relies to excuse or justify the forbidden act.
3. SAME—CHARGE OF THE COURT.—A defense witness testified that, about a month before the alleged offense, the accused had a difficulty in the Indian Territory with one Phelps; that Phelps made an unsuccessful attempt to obtain a weapon with which to kill the accused, and afterwards told the witness that he, Phelps, was "going to Gainesville and fix himself, and that he and Jim Stilly never could live in the same country," which threat the witness communicated to the accused. Upon this proof the defense requested the following charge: "The law authorizes an individual to carry on his person a pistol, who has a reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. To justify such apprehension, it is not necessary that the danger should in fact exist, or that the person threatening should be present, or in view of the defendant at the time of carrying the pistol, but it is only necessary that the facts and circumstances should be of such a nature as to excite a reasonable apprehension of danger so imminent and threatening as not to admit of the arrest of the party threatening an attack." *Held* that the danger contemplated by the statute was not proved, and the instruction was properly refused.

APPEAL from the County Court of Cooke. Tried below before the Hon. J. E. Hayworth, County Judge.

The opinion discloses the case.

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The penalty assessed against the appellant was a fine of twenty-five dollars and confinement in the county jail for twenty days.

Mathis & Lewis, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for unlawfully carrying a pistol upon the person. It is claimed by the defendant that the conviction is wrong for two reasons: first, that at the time he carried the pistol he was a "person traveling," and, second, that he had reasonable ground for fearing an unlawful attack upon his person, etc.

A "person traveling" may lawfully carry upon his person a pistol or other weapon. (Penal Code, art. 319.) In this case the evidence shows that the defendant, accompanied by his wife and child, left his residence in the Indian Territory to go to Bloomfield, in Cooke county, a distance of fifty miles, to the home of defendant's wife's parents. They traveled in a wagon. Two other persons went with them in the wagon, who intended to and did stop at Gainesville, which place was on the route to Bloomfield. They reached Gainesville at night and stopped at a wagon yard. Defendant left his wife, child and companions at the wagon yard, saying that he would go into town and try and hire a hack to take his wife and child on to Bloomfield that night, as the team which had brought them to Gainesville was fatigued and he did not wish to drive it further that night. He was shortly afterwards arrested in a gambling house, while he was sitting at a table with other persons, and a pistol was found upon his person.

We are clearly of the opinion, while he was making the journey from his home to Gainesville, and while he was at the wagon yard where he had stopped, he was a "person traveling" within the meaning of the statute, and did not violate the law in carrying a pistol upon his person during said time. We are also of the opinion that he might lawfully have carried the pistol upon his person in the town of Gainesville during a temporary cessation of his journey, and for a legitimate purpose, such as to procure a conveyance, or provisions, or to transact other business connected with the prosecution of his journey. But beyond this we do not think the law intends to protect him.

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Syllabus.

It would be an unreasonable interpretation of the intent of the law to hold that a person traveling might stop in a town or city, and idly stroll through its streets and visit its gambling dens and saloons and public places, armed with a pistol. The practical result of such an interpretation of the statute would cause our cities and towns to be infested with armed men, while the citizens of such places would be prohibited from carrying arms to protect themselves from these privileged characters. We are of the opinion, therefore, that the evidence does not show that the defendant, at the time he was found in the gambling house, with the the pistol upon him, was a "person traveling" within the meaning of the statute. He was not then traveling. He was not engaged in any business connected with his journey. If he was so engaged it devolved upon him to show it, which he failed to do. His having the pistol upon his person at the time, place, and under the circumstances proved, made a *prima facie* case of guilt against him, and it devolved upon him to establish the facts or circumstances on which he relied to excuse or justify the prohibited act. (Penal Code, art. 51.)

As to the other defense claimed by the defendant, the evidence does not establish it. No such danger existed as is contemplated by the statute, and the court did not err in refusing the special instructions requested by the defendant.

We are of the opinion that there is no error in the conviction, and it is affirmed.

Affirmed.

Opinion delivered April 10, 1889

No. 6283.

CHARLEY WRIGHT v. THE STATE.

PRACTICE—SPECIAL PLEA—CHARGE OF THE COURT.—If upon a criminal trial a special plea is submitted to the jury, the verdict, to be valid, must expressly find that it is true or untrue, and a charge of the court which omits to so instruct the jury is erroneous. The defendant in this case interposed a plea of former conviction, which was neither charged upon by the court nor expressly determined by the verdict. *Held*, that the conviction must be set aside.

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Syllabus.

APPEAL from the County Court of Cooke. Tried below before the Hon. J. E. Hayworth, County Judge.

This conviction was for exhibiting a gaming table, and the penalty assessed by the verdict was a fine of twenty-five dollars and imprisonment in the county jail for ten days.

No brief on file for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. In the trial court the defendant pleaded in due form a former conviction for the same offense. Evidence was adduced by him in support of said plea, and the court submitted the issue made by said plea and evidence to the jury. The verdict of the jury does not find whether said plea is true or untrue, but merely finds the defendant guilty as charged, and assesses the punishment.

Where a special plea is submitted to the jury, the verdict must expressly state whether said plea is true or untrue, and an omission to so state is error for which the verdict must be set aside. (Burks v. The State, 24 Texas Ct. App., 326; Smith v. The State, 18 Texas Ct. App., 329.) The court in its charge should have instructed the jury explicitly that they must find and state in their verdict whether said plea was true or untrue. Such instruction the court failed to give.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered April 10, 1889.

No. 6268.

JOHN O'BRIEN *v.* THE STATE.

BURGLARY TO COMMIT THEFT.—INDICTMENT for burglary charged that the house was entered with the intent to commit theft, but fails to charge that the entry was made with the fraudulent intent to take the property from the possession of the owner; and the allegation of theft fails to charge that the property was taken from the *possession* of the owner. *Held* insufficient to charge the offense.

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Opinion of the court.

APPEAL from the District Court of Dallas. Tried below before the Hon. R. E. Burke.

The conviction was for burglary, and the penalty assessed was a term of three years in the penitentiary.

The sufficiency of the indictment is the only question determined on the appeal.

No brief on file for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for burglary. The entry into the house is alleged to have been made with intent to commit theft.

The indictment fails to allege that the appellant entered the house with the fraudulent intent to take the property from the possession of the owner, etc., and that part of the indictment charging the theft fails to allege that the property was taken from the *possession* of the owner.

Theft, as are all other offenses in this State, is a crime by statute, and the rules of pleading applicable to such offenses must prevail. The language of the statute must be followed, or language of equal or greater import must be used.

Now, there is no term used in the indictment which is sufficient to convey the same meaning as that used in the statute. The property may have been taken from the owners, and yet not taken from his possession.

We are of the opinion that the indictment is not sufficient. The judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

Opinion delivered April 10, 1889.

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No. 6239.

J. W. MONK *v.* THE STATE.

1. PRACTICE—QUALIFICATIONS OF JURORS.—One of the disqualifications of a juror is that he has served as a juror in the district court for six days during the preceding six months. *Held*, that service as a juror for but *five* days is not a disqualification.
2. MURDER—INDICTMENT—DILIGENCE—EVIDENCE.—Allegation in an indictment for murder that the deceased was killed by a shot fired from a gun will admit proof that the fatal shot was fired from any kind of a fire arm. But in this case the indictment alleged that the deceased was shot and killed by the defendant "with a weapon to the grand jurors unknown." To prove the diligence of the grand jury to ascertain the character of the weapon used, the State asked the foreman of the grand jury: "What effort, if any, did you make to learn the manner and cause of the death of deceased, and what conclusion did you arrive at?" The witness replied as follows. "We had a great many witnesses before the grand jury, and we returned this indictment, which we thought was right." *Held* that the question was erroneously allowed, because upon the question of diligence it was too broad and comprehensive, and was calculated to and did elicit an answer at once incompetent and prejudicial to the rights of the defendant.
3. PRACTICE—EVIDENCE.—The indictment having alleged that the deceased came to his death by being shot, it devolved upon the State to establish that fact by competent evidence. See the opinion for evidence admitted on the issue, *held* incompetent because in part hearsay, and in part the opinion of a witness based upon investigation to which the defendant was not a party.
4. MURDER—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction for murder in the second degree.

APPEAL from the District Court of Dallas. Tried below before the Hon. R. E. Burke.

The conviction in this case was in the second degree for the murder of C. Spears, in Dallas county, Texas, on the first day of November, 1887. The penalty assessed against the appellant was a term of five years in the penitentiary.

J. C. Crownover was the first witness for the State. He testified that he and Bruce Davis went hunting in the Rowlett creek bottom on the twenty-fifth day of November, 1887, and in the Bryant branch, which traversed that bottom, they found the remains of a man. The body was under a log in a hole

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Statement of the case.

that had been washed out by the action of the water. It was partially covered by drift composed of trash and sticks. One leg was pointing straight and the other was doubled to. There was a bullet hole through the skull. The witness saw that the body was that of Calvin Spears, a man whom he had seen but once alive, on which occasion he wore pants and boots corresponding with those found on the body. Calvin Spears had black hair and moustache, and the hair that showed upon the body was black. Decomposition was so far advanced that witness could make no satisfactory estimate of the size of the man in life, nor could he tell from the skeleton whether he was a white or black man. On his cross examination the witness said that the one time he saw Calvin Spears in life was about six weeks before he found the remains in the Bryant branch. He saw the witness Anderson on the same day, but could not say now how Anderson was dressed on that day, nor could he remember how he was dressed himself on that day. Calvin Spears was a tall and slender man, measuring six feet or more in height.

Bruce Davis testified, for the State, substantially as did the witness Crownover, except that he expressed no opinion as to whose body it was that he and Crownover found, and he said nothing about ever having seen Spears in life. The coat exhibited in evidence was the coat found on the body. The pants found on the body were of striped material, the stripes running up and down, and not across or around.

J. H. Anderson testified, for the State, that he lived on Rowlett creek in Dallas county, Texas. He was acquainted with the defendant and W. C. Jump, and in October, 1887, knew a man named Calvin Spears. Defendant and Jump went to work for witness on his place on October 20, 1887, and quit on October 28, 1887. Spears worked on the same place for witness from October 22, 1887, until October 25, since when the witness had not seen him. He was frequently absent for short periods of time during the said three days. Defendant and Jump were brothers-in-law, but witness was unable to say whether or not Spears was related to either of them. The witness last saw Spears alive on October 25, 1887, when, in company with defendant and Jump, he left witness's place to go to Dallas. Spears and Jump each rode a sorrel pony and defendant rode a gray pony. Jump came back to the witness's place on the evening of that day,

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Statement of the case.

and the defendant on the evening of the next day. The witness saw the body found in Bryant's branch, and recognized the clothing on it as the clothing of Calvin Spears. The coat exhibited on this trial was the coat worn by Spears when, with defendant and Jump, he left witness's house on the morning of October 25. He recognized the pants on the body by means of a patch on the knee, which said patch had a selvige strip through it. Spears's hair and moustache were dark, but not black, and the hair and moustache on the body corresponded with Spears's. Witness paid defendant on October 29 something over two dollars, balance due him on work. He came back on the following Thursday and left again on Saturday, about an hour before sunset. Witness asked him as he left which way he was going, and he replied: "The way my wagon tongue points when I start." The witness lived on the north side of the Rockwall road. H. C. Mills lived four and a half miles north from witness's house. Rose Hill was about a quarter of a mile south from witness's house. The body was found about half a mile above the bridge that spanned Rowlett's creek. Spears had a thirty-eight calibre pistol at defendant's camp on one occasion.

On cross examination, the witness said that he could not remember which of the three men, when they left his house on October 25, told him they were going to Dallas. Spears was a man of medium stature, heavy set, and would weigh about one hundred and fifty pounds. He worked for witness on witness's place, but lived at defendant's camp, about two hundred yards distant from witness's house. Defendant's mother, brothers and sisters, one of the sisters being Jump's wife, with Jump, defendant and Spears, lived in that camp. Spears and defendant each owned a horse, and Mrs. Monk, defendant's mother, owned four horses and two colts, all of them being kept at the camp. Dallas was southwest from witness's house. Garland was northwest. The body was found north of witness's house. When defendant returned to witness's house, after leaving it with Jump and Spears on October 25, he told witness that Spears was in Dallas trading horses.

W. M. Porter testified, for the State, that defendant, Jump and Spears worked for him a few days early in October, 1887. From the witness's place Spears went to Adams's place to work, and defendant and Jump went to Anderson's. The witness never saw Spears exhibit any money in the presence of

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the defendant, but on one occasion, when defendant was not present, he saw him with about one hundred dollars in currency. The coat exhibited, which the witness knew to be the one taken from the body found in Bryant's branch, was the identical coat worn by Spears when he worked for witness. Witness knew it by the lining of the pockets being of different colors. Witness often saw the said lining, as Spears carried whisky in a bottle that fitted so close in the pockets that always, when withdrawn, it would bring the lining out. Spears was a man of short stature, not above five and a half feet in height, was heavy set, and wore his hair cut short.

Thurston Anderson, the son of the witness J. H. Anderson, testified, for the State, that, three or four days before defendant, with Jump and Spears, left witness's father's house to go to Dallas, witness saw Spears with a roll of currency money. Defendant was present, but witness could not say whether he did or did not see the money.

J. C. Anderson testified, for the State, that he saw the body found in Bryant's branch, and by the clothes recognized it as the body of Calvin Spears. Witness met defendant in the town of Rose Hill some time in October, 1887, and tried to sell him some goods. He declined to buy upon the ground that he had bought Spears's pony and was "busted." Witness had seen Spears riding a small gray pony. Defendant did not say that he had *traded* for Spears's pony, but that he had *bought* it.

L. A. Adams testified, for the State, that defendant, Jump and a man named "Pierce" picked cotton for him in October, 1887. Defendant and Jump left witness's place and went to work for Anderson. About a week later Pierce quit working for witness and went to work for Anderson. Defendant, Jump and Pierce, on horseback, passed witness's house on the morning of October 25, 1887, when one of them told the witness that they were going to Dallas. Witness never saw Pierce afterward. The coat exhibited in evidence, which was the coat taken from the body found in Bryant's branch, was the coat worn by Pierce when he worked for the witness.

The witness stated, on cross examination, that no man giving the name of Spears worked for him in 1887.

Andrew Spillars testified, for the State, that in the fall of 1887,—he could not fix the month,—he saw the defendant sitting by the road side at the corner of his, witness's, fence. Defendant told witness, as witness passed him, "that he would meet

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two parties riding sorrel ponies, and to tell them to "ride up." The witness met the two men described, riding towards Garland. They were then three and a half or four miles distant from Mills's house. On cross examination the witness said that he did not know either of the two men he met on the sorrel ponies, but thought one of them was W. C. Jump. From where the witness saw the parties to the place where the body was found, the distance was two and a half or three miles.

R. T. Little testified, for the State, that he saw the body found in Bryant's branch, and recognized it by the clothes as that of Calvin Spears. He identified the pants and boots. The witness last saw Spears alive on or about the morning of October 25, 1887, when he and W. C. Jump came to witness's house. Witness's said house was a little northwest from Anderson's, and about three miles from Mills's place. Spears on that occasion went with the witness into a stable where the witness kept a horse that was to run a race in November. Spears told witness that he was going to bet on witness's horse at that race.

H. C. Mills testified, for the State, that Jump and the defendant and another man came to his place about October, 25, 1887, and asked for directions to the place on which Grooms and Cockrell lived. They said they were hunting land to rent. Defendant was riding a gray, and the other two men sorrel ponies. The men went south, on leaving, until they got off witness's place, and then turned east toward the Grooms-Cockrell place. The body was found at a point south-east from witness's place. There was no road near where the body was found. There was a plain public road leading from witness's place to the Grooms-Cockrell place.

Silas Bryan testified, for the State, that, one morning, late in October, 1887, he met the defendant, his younger brother, and W. C. Jump, crossing a bridge which was about half a mile above the place where the body was subsequently found. They were going towards Anderson's, where they said they lived. They asked witness if he knew of any land to rent.

Will Cockrell testified, for the State, that late in October, 1887, he overtook defendant, Jump and another man, on the road going northeast from Anderson's, and east of Mills's place. They wanted to know if witness knew of anybody who had land to rent or cotton to be picked. Witness told them that he

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had some cotton to be picked, and they promised to visit witness's place to examine it, but never came.

D. W. Houseley, postmaster at Rose Hill, testified for the State, that he frequently saw Calvin Spears during the two weeks he lived near Rose Hill. He saw the dead body found in Bryant's branch, and recognized the clothes on it as the clothes worn by Calvin Spears during the time that he knew said Spears.

The opinion sets out in full the testimony of justice of the peace Alexander as delivered on his examination in chief. On cross examination the witness said that the body was found in Bryant's branch about thirty feet from where it empties into Rowlett's creek. The said creek, when half full of water, overflowed the place where the body was found. Decomposition was very far advanced when the body was found. The head had rotted off, as had the arms and legs, which were held in place by the clothing, and which fell apart when moved. The bones of the head and face were bare, all of the skin and flesh having disappeared. The ground where the body was found was damp, and it was evident that water had run over the body since it was placed there.

Henry Leifester testified, for the State, that he was deputy sheriff of Mason county in 1887 and 1888. In January, 1888, he arrested the defendant while plowing in his uncle's field in Mason county. He was plowing a small sorrel horse branded S on the left shoulder. Mason county was about four hundred miles distant from Dallas. Defendant made no resistance, nor did he attempt to escape or to avoid arrest. The testimony of H. F. Ewing, the foreman of the grand jury which framed this bill of indictment, is set out in the opinion of the court. The State closed.

Dr. Wray, testifying for the defense as an expert, said that if the "body of a man was placed in the bottom of a dry branch and covered with sticks and trash in the fall of the year, the season being an ordinary one, it would require four or five months for the body to become sufficiently decomposed for the head, legs and arms to drop off by the movement of the body. If the body was subject to the action of water it would require a somewhat longer time for decomposition to advance to the stage described in this case. Dr. Thurston, for the defense, testified as did Dr. Wray, except that the period named by him as necessary for decomposition to have advanced to the stage

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indicated by the evidence in this case was six months. The last witness thought that the coat would have rotted away before the ligaments connecting the arms and the body would. Crows and buzzards, if able to get to the neck, might have so eaten it as to separate the head from the trunk.

Mrs. M. A. Work, the mother of the defendant, and mother-in-law of W. C. Jump, was the next witness for the defense. According to her narrative she and her family, including the defendant, left their home in Bosque county, in September, 1887, in consequence of the total failure of crops, and went to Ellis county, where Jump was at work. They were joined near Waco by Spears, who asked to be taken along as far as witness's party should go, agreeing to take care of the stock for his food. He told witness that he was out of money, having but twenty-five cents, and was making his way to the Indian Territory. He was riding a small gray pony, and was very poorly dressed. Reaching a point near Waxahachie, where Jump was at work, the entire party picked cotton for a few days, and then went on to Dallas county, Jump and his wife going with them. In Dallas county the party first picked cotton for Porter, then for Adams, and then for Anderson. Spears boarded with the witness during the entire time, except when he worked for Adams, and he and defendant got to be good friends.

A few days before the day on which Spears disappeared, he came to witness's camp, and said that he had seen a sheriff in the next field, and that, as he had been charged elsewhere with fence cutting and other crimes, and did not propose to be "hemmed up," he would not sleep in camp again. Accordingly that night he took his blankets, and went to the field some distance from the camp. He expressed great uneasiness and declared his anxiety to get on to the Territory. On the evening before he left he told witness that he was going to Embree, and that, if he found a letter he was expecting at Embree, he would not return. At the same time he instructed witness to collect some money due him from Adams, and apply it to his board and washing. He also traded horses with defendant, getting thirty-five dollars to boot. Jump came back to camp on the evening of the day the three men left camp (October 25, 1887), and defendant came on the evening of the following day. On the following Saturday witness and her family and Jump went to Terrell, where witness rented land. Defendant

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then went to Brown county to look after a farm owned by witness. Losing his horse in Brown county, he went to his uncle's place in Mason county to work with him. The coat found on the dead body was here exhibited to witness, and she declared positively and emphatically that it was not Spears's coat, and had never been worn by him, though in color and texture it somewhat resembled his coat. Witness had often had Spears's coat in her hands, mending it, and she knew where all the rents were. There was not a rent in this coat corresponding with a single one in Spears's coat.

C. S. Hays testified, for the defense, that he was familiar with the reputation of defendant as a law abiding, honest citizen, in Bosque county, since his, defendant's, childhood, and that it was good.

Fitzhugh & Wozencraft, Smith & Obenchain, and *Kenneth Foree,* for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction was for murder of the second degree with the penalty fixed at five years in the penitentiary.

The State challenged the proposed juror Bailey for cause, upon the ground that he had served one week on the jury in the district court of Dallas county within the past six months. Bailey had served five days during a week. The court sustained the challenge, and counsel for appellant excepted and reserved his bill. The learned judge appends to the bill this explanation: "Defendant never exhausted his peremptory challenges."

The juror was not disqualified under article 3010, Revised Statutes (Thompson v. The State, 19 Texas, Ct. App., 593.) But "appellant did not exhaust his challenges." If he had exhausted every challenge allowed him by law, Bailey would not have been restored to competency as a venireman. Bailey being a competent juror, the State should have been compelled to challenge him either for cause or peremptorily.

The indictment alleges that appellant shot and killed deceased "with a weapon to the grand jurors unknown." If the pleader had alleged a gun as the weapon, under such allegation proof that deceased was shot with any character of fire arms would have been competent. But, having omitted to name the

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weapon, the State introduced evidence to prove diligence on the part of the grand jury to ascertain the character of the weapon—that is, whether a gun or a pistol, we suppose; and the county attorney propounded this question to the foreman of the grand jury: "What effort, if any, did you make to learn the manner and cause of the death of the deceased, and what conclusion did you arrive at?" The witness answered: "We had a great many witnesses before the grand jury, and we returned this indictment, which we thought was right." Counsel for appellant objected to the question and also to the answer.

We are of opinion that the objection to the question was well taken; because, if it was the purpose of the State to show that the grand jury had used the necessary diligence to ascertain the weapon (whether gun or pistol) with which the deceased had been killed, then the question was too broad—too comprehensive—and was clearly calculated to elicit the answer given by the witness, and which answer was most evidently incompetent and very prejudicial to the accused. If the State desired to show diligence on the part of the grand jury to learn whether deceased was shot with a gun or pistol, the witness should have been asked what efforts, if any, did you make to ascertain the fire-arm with which the deceased was killed? Such a question could have been answered without danger to the rights of the accused; the witness would be confined to the diligence regarding the weapon.

The indictment alleging that the deceased came to his death by being shot, the State was bound to prove this to be true, and this fact must be proved by competent and not hearsay evidence. Over objection of defendant the State proved by the witness Alexander that he was justice of the peace in the precinct in which the body which was supposed to be that of Calvin Spears was found, at the time that said body was found, and that he held an inquest over said body, and that he and and the jury of inquest examined a great many witnesses at said inquest, and searched the ground near where the body was found for weapons, and from the hole in the head and the appearance of the body, and the testimony of witnesses, it appeared that deceased came to his death from being shot.

This testimony is obnoxious to two objections. 1. A part of it is hearsay. 2. A part is the opinion of the witness, the re-

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sult of an investigation to which the appellant was in no manner a party.

Appellant's last assignment of error is that the verdict is not supported by the evidence. In this we think counsel for appellant is correct. We are not willing to sanction, and allow to serve as a precedent, a verdict founded upon such vague and inconclusive facts. (The Reporter will give the facts in full.)

For the reasons noted above, the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

Opinion delivered April 10, 1889.

No. 6238.

W. C. JUMP v. THE STATE.

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1. MURDER—EVIDENCE.—The indictment charged the murder of one C. Spears. The State proved that subsequent to the disappearance and alleged murder of Spears the defendant collected from one A. a sum of money due by A. to one *Pierce*. *Held*, that in view of proof showing the said Pierce and the said Spears to be one and the same person, the evidence was properly admitted.
2. SAME.—The sheriff of Dallas county was permitted, over objection by defendant, to testify that, subsequent to the alleged murder, he arrested Monk, a party charged by separate indictment with the same offense, in a distant county. *Held*, error, because even if the evidence were sufficient to establish a conspiracy between defendant and Monk, the proof related to matters transpiring after the consummation of the conspiracy.

APPEAL from the District Court of Dallas. Tried below before the Hon. R. E. Burke.

This is the companion case to the preceding case of Monk v. The State, the conviction being in the second degree for the same murder—the penalty in this case being assessed at a term of twenty-five years in the penitentiary. The evidence in this case is identical with that in Monk's case, except that, in addition to the facts stated on Monk's trial, the State's witness Adams testified on this trial that on the morning after the dis-

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appearance of "Pierce" (Spears) the defendant came to his house and collected from him the sum of ten dollars which Pierce (Spears) had left with him, and told him that said Pierce (Spears) was near Dallas, pulling corn. The evidence shows also that Spears, the alleged deceased and the person spoken of by the witness Adams as Pierce, were one and the same person.

Fitzhugh & Wozencraft, Smith & Obenchain and *Kenneth Foree*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a companion case to that of Monk v. The State, just decided. Monk and Jump were separately indicted for the murder of C. Spears. They were separately tried and convicted—this appellant being given twenty-five years in the penitentiary.

The State proved, over objection, that appellant, after the death of Spears, collected ten dollars from the witness Adams, which money Adams owed to Spears. This, under the facts of this case, was competent evidence. Counsel for appellant contends that, as the witness Adams states that he was indebted to *C. Pierce*, not *Spears*, the fact that appellant collected the money was immaterial. This would be correct but for the proof that Spears and Pierce was the same person. Adams knew him by the name of Pierce, while his true name was Spears.

There was error in permitting the State to prove by J. H. Taylor the matters complained of in bill of exceptions No. 4. (See the opinion in Monk's case with reference to the testimony of Alexander.) There was also error in permitting the State to prove by Alexander the matters complained of in bill No. 5. This matter is also discussed in Monk's case.

It was also error to permit the State to prove by Lewis, the sheriff, that, after the homicide, he had arrested Monk in Mason county, about four hundred miles from Dallas; because, if a conspiracy between Monk and defendant Jump had been shown, it had unquestionably ended. We will not discuss the rule relating to the admission in evidence of the acts and declarations of a co-conspirator; for, if what has already been said in repeated decisions can not be understood, we feel our

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inability to express our views more explicitly, or with greater clearness.

The remaining assignment of error is that the evidence is insufficient to support the verdict. What has been said in the opinion in the Monk case is applicable to this. We are not satisfied to allow the verdict to stand and thus become a precedent. The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered April 10, 1889.

No. 6290.

STEVE STEVENS v. THE STATE.

1. AGGRAVATED ASSAULT AND BATTERY—EVIDENCE.—See the opinion for the substance of evidence *held* insufficient to support a conviction for aggravated assault and battery because insufficient to support the ground of aggravation alleged in either of the counts of the indictment.
2. SAME—DILIGENCE—NEW TRIAL.—The application for continuance shows that the defendant sued out as many as four subpœnas and one attachment for the absent witness, who was a resident of Dallas county, and alleged that by the absent witness he would prove that the alleged injured party was the aggressor, and that he struck said party only in defense. The testimony of the prosecuting witness was not only contradicted as to material matter by the witnesses for the defense, but they testified that the prosecuting witness cursed the defendant, and struck him before defendant struck the prosecuting witness, and that, when the defendant finally struck the two blows inflicted upon the prosecuting witness, he, defendant, was retreating. *Held* that the diligence being sufficient, and the absent testimony being, in view of the proof, both material and probably true, a new trial should have been awarded.

APPEAL from the County Court of Dallas. Tried below before the Hon. E. G. Bower.

This conviction was for an aggravated assault and battery on one G. W. Blasdell, and the penalty assessed was a fine of fifty dollars and sixty days in the county jail.

J. J. Eckford, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Syllabus.

WHITE, PRESIDING JUDGE. There were two counts in the information upon which this conviction was had, viz: One for an aggravated assault committed with a deadly weapon, and one for an aggravated assault, by which serious bodily injury was inflicted. In our opinion neither of these counts has been established by the evidence as disclosed in the record before us.

The only evidence as to the character of the weapon used is that "it was a good sized walking-stick, made of Bois d'Arc and loaded." Defendant's witness testified that "the walking-stick was a fair sized walking-stick." There is no evidence that it was a deadly weapon.

As to the injury inflicted, the injured party, Blasdell, testified that when he was struck again over the eyes, this last blow partially stunned him and defendant ran off. The other State's witness says the lick over the eye cut the skin. Another witness saw Blasdell wipe blood from his forehead. This evidence is insufficient to show serious bodily injury.

Under the circumstances developed by the evidence adduced at the trial, we are further of opinion that a new trial should have been awarded on defendant's application for a continuance. We think the application showed sufficient diligence in the first place, and the materiality and probable truth of the proposed testimony in the light of the other testimony is, we think, unquestionable. The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered April 10, 1889.

Nos. 6197 and 6198.

ADAM ARMSTRONG *v.* THE STATE.

FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY—INDICTMENT, to be sufficient to charge the offense of fraudulently disposing of mortgaged property, with intent to defraud, etc., must allege the name of the person to whom the mortgaged property was disposed or sold, or that the name of such person was to the grand jury unknown.

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Syllabus.

APPEALS from the District court of Dallas. Tried below before the Hon. G. N. Aldredge.

These were convictions for fraudulently disposing of mortgaged property, the penalties assessed being a term of two years in the first and of three years in the penitentiary in the second case.

No brief in either case for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant in each of the above cases has been convicted of a fraudulent disposition of mortgaged property. An indictment, to be sufficient to charge the offense of selling or disposing of mortgaged property with intent to defraud, must allege the name of the person to whom the mortgaged property was disposed or sold, or that the name of such person was unknown to the grand jury. (Smith v. The State, 26 Texas Ct. App., 577; Presley v. The State, 24 Texas Ct. App., 494; Alexander v. The State, ante. 94.)

Because the indictments in these cases are fatally defective in this regard, the judgments are reversed and the prosecutions dismissed.

Reversed and dismissed.

Opinion delivered April 10, 1889.

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No. 6229.

GEORGE TAYLOR v. THE STATE.

1. THEFT—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.—The *factum probandum* of theft is the taking of the property. If that fact is proved merely as a matter of inference from other facts in evidence, and not by an eye witness, the case rests wholly upon circumstantial evidence; and the failure of the trial court to charge the jury upon the law of circumstantial evidence is material error.
2. SAME—POSSESSION OF RECENTLY STOLEN PROPERTY is not positive evidence of theft, but merely a circumstance tending to prove theft, and is therefore in its character simply circumstantial evidence; and,

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when alone relied upon by the prosecution, demands of the trial court a charge upon the law of circumstantial evidence.

3. SAME.—If the inculpatory facts in a theft case consist alone of recent possession of stolen property, explained by the accused when first challenged, it imposes upon the court the imperative duty of explaining to the jury in its charge the law applicable to such recent possession and explanation.

4. PRACTICE—PRIVILEGE OF COUNSEL.—While on the stand the sheriff was asked by the prosecuting attorney if he did not arrest the defendant several years ago for burglary. The defense objected, and the prosecuting attorney remarked, in the hearing of the jury, that he proposed to "prove by the sheriff that defendant was arrested two or three years ago for a burglary committed in Dallas county, at the same time and place as he is now charged with theft." *Held*, that such proof was not competent, and the trial court should so have instructed the jury.

APPEAL from the District Court of Dallas. Tried below before the Hon. R. E. Burke.

The conviction in this case was for theft of property over the value of twenty dollars, and the penalty assessed against the appellant was a term of two years in the penitentiary.

Dan Stewart testified, for the State, in substance that a coat, vest and pair of shoes, worth in the aggregate more than twenty dollars, were stolen from his room over the "Coney Island" saloon in Dallas, Texas, about the time alleged in the indictment. He did not know who stole the said articles.

Dick Nelson, an employe about the Coney Island saloon, testified, for the State, that on the day named in the indictment, he heard some person go into Stewart's room and leave it again. He thereupon stepped out of the saloon and intercepted defendant in the act of leaving the building with a bundle under his arm. He asked the defendant what the bundle contained. Defendant first denied that he had a bundle, and then said that the bundle was handed to him to hold by a man who went up stairs. Witness then called a policeman, who arrested defendant. The bundle proved to be Dan Stewart's coat, vest and shoes. He did not see defendant take the articles.

Witnesses for the defense testified that the articles, being second hand, were worth less than twenty dollars. State witnesses in rebuttal testified that they were worth in the market more than twenty dollars.

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Opinion of the court.

Isaac R. Oeland, for the appellant.

W. L. Davidson, Assistant Attorney General for the State.

WHITE, PRESIDING JUDGE. No one saw the defendant take the alleged stolen property. As made by the evidence, the case was one of possession, explained by defendant, of property recently stolen, the sufficiency of such explanation being a question for the jury. "The *factum probandum* of theft, as that offense is defined by our statute, is the taking of the property. If the *taking*, being the main fact in issue, is not directly attested by an eye witness, but is proved as a matter of *inference* from other facts in evidence, the case rests wholly upon circumstantial evidence, and the failure of the trial court to give in charge to the jury the law of circumstantial evidence is material error." (Crowell v. The State, 24 Texas Ct. App., 404.)

"Possession of recently stolen property is not positive evidence of theft. At most, it is but a circumstance tending to establish theft. A case, therefore, depending alone upon the possession of recently stolen property is a case resting alone upon circumstantial evidence, and in such case the omission of the trial court to charge the jury upon the law of circumstantial evidence is material error." (Boyd v. The State, 24 Texas Ct. App., 570.) "And the charge of the court in a theft case, if the inculpatory facts consist alone of recent possession of stolen property, explained by the accused, when his possession was first challenged, is insufficient unless it explains to the jury the law applicable to such recent possession and explanation." (Fernandez v. The State, 25 Texas Ct. App., 538; Florez v. The State, 26 Texas Ct. App., 477.)

In this case the charge of the court fails to instruct the jury either upon circumstantial evidence or the law with regard to property recently stolen, with explanation of his possession by the defendant.

The remark of the prosecuting attorney in the presence of the jury that he proposed to "prove by the sheriff that defendant was arrested two or three years ago for a burglary committed in Dallas county at the same time and place as he is now charged with theft," was clearly wrong and calculated to prejudice defendant with the jury. Such evidence was not admis-

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Syllabus.

sible, and afforded no reasonable presumption or inference pertinent to the issue in the case for which defendant was on trial, and the court failed so to instruct the jury. (Cesure v. The State, 1 Texas Ct. App., 19; Chumley v. The State, 20 Texas Ct. App., 547, and authorities cited.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered April 10, 1889.

27a 466
27a 473

No. 6253.

JOHN WILLIAMS *v.* THE STATE.

1. PRACTICE—PRINCIPAL OFFENDER AND ACCESSORY.—Under the provisions of article 90 of the Penal Code, the principal offender, if in arrest, must be tried before his accessory can be tried; wherefore the motion of the defendant (who was charged as a principal), that the person charged as his accessory be first put upon trial was correctly overruled.
2. SAME—THEFT—EVIDENCE.—Over the objection of the defendant the State was permitted to introduce in evidence a bill of sale, conveying the alleged stolen horses to the defendant, which bill of sale was found in and taken from the possession of the defendant after his arrest. *Held*, that said bill of sale was properly admitted, in view of the proof showing that it was fabricated by the defendant. It was no objection to said evidence that it was taken from the defendant after his arrest and without authority of law.
3. SAME.—AS A STANDARD OF COMPARISON whereby to identify the handwriting in the bill of sale as that of the defendant, the State was permitted to introduce in evidence the authenticated signatures of the defendant to application for continuance, etc., in this case. *Held* correct.
4. THEFT—TRANSPORTATION OF STOLEN PROPERTY INTO THIS STATE—PRINCIPAL OFFENDER—CHARGE OF THE COURT.—See statement of the case for a special instruction, given in charge to the jury, at the instance of the State, *held* correct.
5. SAME.—It is the province of the court, in cases involving the construction of the laws of another State or country, to construe such laws, and determine when such laws have been established in evidence. In this case the charge left that question,—involving the laws of New Mexico as to theft,—to the jury, whereas it should have explained to the jury the purport of that law, and instructed them that it had been proved. The error, however, is not reversible error, as it was favorable to the defense.

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Statement of the case.

6. THEFT—FACT CASE.—See statement of the case for evidence *held* sufficient to support a conviction for horse theft.

Appeal from the District Court of Wilbarger. Tried below before the Hon. P. M. Stine.

The conviction in this case was had under an indictment which charged the appellant with the theft of two horses, the property of Henry Heineke, in Wilbarger county, Texas, on the thirtieth day of November, 1887. The penalty assessed by the verdict was a term of ten years in the penitentiary.

Henry Heineke was the first witness for the State. He testified, in substance, that he lived on his ranch in San Miguel county, in the Territory of New Mexico, about thirty-five miles west from Las Vegas. Two horses, the property of the witness, were stolen from the said ranch on the night of September 15, 1887. Both were dun colored animals, one having dark colored mane and tail and the other light colored mane and tail. They were branded alike on the left side of the neck—the brand being three upright strokes crossed with a horizontal bar through the middle, making a double H connected. The said brands were exactly two by two inches in size. The said horses were taken from the witness's home pasture, which adjoined his house, without his knowledge or consent. They were in good condition when taken. Witness next saw the said horses in January, 1888, when Mauricio Lucero, whom he sent to Texas, brought them back to the said ranch, at which time they were in a very reduced condition. The brands described had been changed into peculiar characters, different on each horse, and the same characters were counter branded on the hip. In August or September, 1887, the witness saw a young man on the streets of Las Vegas, which young man he verily believes he identifies in the defendant.

Mauricio Lucero testified, for the State, that at present and in August and September, 1887, he lived with and was in the employ of Henry Heineke, on the latter's ranch in San Miguel county, New Mexico. He testified substantially as did Heineke about the theft of the horses, and described them as Heineke did. The witness found the said horses in the possession of John L. Hammond in Vernon, Wilbarger county, Texas, about January 1, 1888, whence he took them to Heineke's ranch in San Miguel county, New Mexico.

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Statement of the case.

George Conger testified, for the State, that he lived in Tom Green county, Texas, and from August to November, 1887, worked on the ranch of the Texas Capitol Syndicate. He was at the "Sod House" in Lamb county in September, 1887. During the latter part of that month the defendant, giving his name as Lon Saunders, in company with a short heavy set man, came to the "Sod House" and stayed all night. They had in their possession two dun horses corresponding with the horses described by the preceding witnesses. On the next morning the defendant and his companion, with the said horses, left the Sod House, going in the direction of Jim Newman's camp. A few days later the defendant, having the said horses still in his possession, came back to the Sod House. On or about the tenth day of the following November the witness saw the defendant and John West together in the Yellowhouse canyon. They had in their possession a bunch of eight or ten horses, including the two dun animals above described. Defendant and West remained in that vicinity two or three days, when they left, defendant saying that they were going north. Tascosa was north of Yellowhouse canyon, and Vernon was east.

Ed. Chapman testified, for the State, that in the fall and winter of 1887 he was in the employ of Jim Newman and lived on the plains in Lamb, Bailey and Lubbock counties. In September, 1887, the defendant, answering to "Lon" as his given name, and a short heavy set, dark complected man called Howard, came to Jim Newman's camp. They had in their possession two dun horses, one with dark and other with light mane and tail, and both branded on the left side of the neck. Two days later witness saw the same horses at the camp of one McMurray, at which time the brands on the neck of each of the horses had been changed, and other brands put on the left hip of each. About a month later the defendant and John West, having the same two horses and eight or ten others, came to Newman's camp, remained over night and left. When witness first saw defendant in possession of the said horses he asked defendant what he gave for them, and defendant replied: "One hundred dollars."

Gilbert Catrell testified, for the State, that he was in the Yellowhouse canyon, in Lubbock county, in the month of October, 1887, and while there saw the defendant and John West in possession of a small bunch of horses, including the two dun animals described by previous witnesses.

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Statement of the case.

W. M. Lay testified, for the State, as did the witness Catrell, about seeing defendant and West in the Yellowhouse canyon with the two said horses. He stated also that late in September he saw the defendant and one Howard, in Lubbock county, in possession of the two horses. He did not then notice the brands. He afterwards (and before he saw defendant and West in the Yellowhouse canyon) saw defendant with the said horses at Howell's place, in Bailey county, at which time the original brands had been changed.

Sid Boykin testified, for the State, that, on the twenty-sixth day of September, 1887, he saw the defendant at Salt Lake, in New Mexico, in company with a short, heavy set man, and in possession of the two dun horses described by the preceding witnesses. About a month later witness saw defendant in Texas with the same two horses.

John L. Hammond testified, for the State, that on or about November 20, 1887, he and one John Pell arrested the defendant and John West in Wilbarger county, Texas, and took from their possession the two dun horses mentioned in the indictment, and described by preceding witnesses. After putting them in jail witness searched them, and on the person of one or the other he found the bill of sale now introduced in evidence by the State, which said bill of sale purports to have been executed on the twelfth day of September, 1887, by one Richard Howard, and to be attested by one Jules Hedrick as a subscribing witness. It purports to convey to defendant, among others, the horses mentioned in the indictment. Witness kept the said horses about two months, when he delivered them to Mauricio Lucero, who claimed them as the property of Henry Heineke.

Deputy district clerk John Brown, introduced by the State, produced an application for continuance, and another for attachments, and testified that the name "John Williams" was signed to each by the defendant in his, witness's, presence.

Jules Hedrick was the next witness introduced by the State. He testified that he lived near Las Vegas in New Mexico, and had known the defendant about two years. Examining the bill of sale in evidence, the witness declared that he had never seen it before, and that his name appearing on the same as an attesting witness was a forgery. He then qualified himself as a handwriting expert, and compared the handwriting in the bill of sale with the signature of the defendant to the applica-

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tion for continuance and attachments. As an expert he then declared that the signatures "John Williams" to the said application, and the signature "Richard Howard" and "Jules Hedrick" to the bill of sale were written by one and the same hand.

The State closed by introducing in evidence sections 68, 69 and 70 of Chapter 1, Title 77, of the Laws of New Mexico, which, in defining the offense of theft of live stock, comprehends the elements of that offense as defined by the statutes of this State.

Bennett Howell was the one witness for the defense. He testified that he lived in Lamb county, Texas. Defendant came to witness's ranch in the fall of 1887. A few days before that a man who gave his name as Howard, having in his possession the two horses mentioned in the indictment, stopped at witness's house, tried to sell to witness the horses, and then went on, inquiring the way to Newman's ranch. Witness told defendant about Howard's visit, and remarked that if defendant would buy the horses, he, witness, would give him, defendant, a good trade for them. Defendant left for the purpose of finding Howard. A few days later he returned with the horses, but he and witness did not agree on terms of a trade.

The special charge of the court, referred to in the fourth headnote of this report, reads as follows: "All persons are principles who act together in the commission of an offense. If, therefore, you believe from the evidence beyond a reasonable doubt that the defendant, together with some other person, fraudulently took the horses in controversy in the Territory of New Mexico, as alleged in the first count of the indictment, from the possession of Henry Heineke, without said Heineke's consent, with intent to deprive the owner of the value of the same, and to appropriate it to their own use and benefit, and that said proporty was the property of said Heineke, and that said act constituted, by the laws of Mexico then in force, the offense of theft, and that defendant afterwards brought the same property into Wilbarger county, Texas, you will find defendant guilty."

No brief on file for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

WILLSON, JUDGE. This conviction is for the theft of two horses. The horses were stolen by defendant in New Mexico, and brought by him into Wilbarger county, Texas. Numerous errors are assigned by defendant, but we have not been aided in considering them by a brief or argument in support of them. We will determine them, however, in the light of such investigation and thought as we have been able to give them.

It was not error to refuse the defendant's motion to put John West upon trial before trying the defendant. Said West was indicted as an accessory to the theft charged against the defendant, and it is expressly provided that where "the principal is arrested he shall be first tried." (Penal Code, art. 90.) The defendant being the principal, and under arrest, it was not only proper but obligatory upon the court to try him first. This requirement of the statute is special and controls the general provision relating to the severance on trial of defendants. (Code Crim. Proc., art. 669*a*.)

It was not error to admit in evidence, against the defendant, the bill of sale found in his possession, or in the possession of the party with him. This bill of sale described the stolen horses, and was manufactured, as the evidence shows, by the defendant. That it was taken from the possession of the defendant while he was under arrest, and without authority of law, did not render it inadmissible evidence against him.

It was not error to permit the State to introduce in evidence the signatures of the defendant to his application for a continuance and applications for attachments. These signatures were proved to be genuine, and were introduced for the purpose of comparing them with the handwriting of the said bill of sale, to show that the defendant wrote said bill of sale. The applications were not read in evidence, and the introduction in evidence of the signatures thereto did not violate the rule which excludes a confession of a defendant made while in jail or other place of confinement.

Several objections are made to the charge of the court, and to the refusal of the court to give instructions requested by the defendant. We will not discuss these objections in detail. We think the charge contains a full, fair and correct exposition of the law applicable to the facts of the case, and embraces substantially, to the extent demanded by the evidence, the instructions requested by the defendant. The instruction given at the instance of the State is, in our opinion, correct, as was inti-

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mated by this court in Fernandez v. The State, 25 Texas Ct. App., 538, where the precise question was discussed but not determined.

We have found but one error in the charge of the court. It submitted to the jury the question of the law of New Mexico with respect to theft. This question was for the court and not the jury to determine, and the charge should have instructed the jury that the law of New Mexico, as to theft, had been proved, and the purport of that law. This error, however, was favorable to the defendant, and he has not and could not complain of it. We notice it only for the purpose of calling the attention of trial judges to the rule that it is the province of the court to determine when the laws of another State or country have been established in evidence, and to construe such laws. These are matters of law and should not be submitted to the jury.

As to the sufficiency of the evidence to support the conviction, there is no doubt in our minds. It is circumstantial, but of the most cogent character, and the jury could not reasonably, we think, have found the defendant not guilty. The judgment is affirmed.

Affirmed.

Opinion delivered April 13, 1889.

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No. 6251.

JOHN WEST *v.* THE STATE.

1. PRACTICE—INDICTMENT.—The State abandoned all but the last count in the indictment. The defense maintains that the effect of such abandonment is to eliminate the caption of the indictment and leave the last count insufficient to charge an offense because it does not commence, "In the name and by the authority of the State of Texas," and does not charge that it was presented by a grand jury of Wilbarger county. *Held*, that the proposition is hypercritical, and that the caption and commencement of an indictment apply to and constitute a part of each and every count contained therein.
2. SAME—THEFT.—The bringing by the thief into a county of this State of property stolen in another State constitutes, under our law, theft in the county into which the stolen property is brought; and one who gives aid to the thief in such county, after the stolen property is brought into it, is guilty as an accessory to the theft.

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Opinion of the court.

3. SAME—EVIDENCE.—Inasmuch as an accessory, whose principal is in arrest, can not be tried and convicted until after the trial and conviction of the arrested principal, it devolves upon the State, in the trial of the accessory, to show the conviction of the principal. And to make such proof in this case, the court properly permitted the State to introduce in evidence the verdict and judgment of conviction rendered against the principal.

4. ACCESSORY TO THEFT—FACT CASE.—See the statement of the case in Williams v. The State, ante, 466, for evidence *held* sufficient to support the conviction of an accused charged as an accessory to theft.

APPEAL from the District Court of Wilbarger. Tried below before the Hon. P. M. Stine.

The same witnesses who testified on the trial of John Williams, and whose testimony is set out in full in the report of that case (ante, p. 466) testified to the same facts on the trial of this appellant, the witness Hammond, in addition to testimony on the trial of Williams, testifying that when he arrested Williams and the defendant, the defendant said to him: "If I had known you was after me, you damned son of a bitch, I would have made it hot for you."

No brief on file for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for being an accessory to the theft of two horses, said theft having been committed by John Williams in New Mexico, and the stolen horses having been brought by him into Wilbarger county, where the defendant gave the said Williams aid in order that he might evade an arrest, etc., for said theft. (Penal Code, art. 86.) Some of the questions presented in this case have been discussed and determined in Williams's case, just decided, and will not be further noticed. (Williams v. The State, ante, 466.)

As presented by the grand jury, the indictment contained several counts. Prior to the trial the district attorney, with the permission of the court, abandoned and dismissed all the counts except the last one, charging the defendant as an accessory to the theft. It is contended by defendant that as the first count of the indictment had been dismissed, the last count was insufficient because it did not commence "in the name and by authority of the State of Texas," and did not allege that the same

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was presented by a grand jury of Wilbarger county, etc. These objections are not sound ones. The commencement and caption are to be considered not only as a part of the first count, but as a part of each and all the counts in the indictment, and may be referred to and considered in aid of any count. They constitute a part of the entire indictment. Counts are independent of each other, and the first or any other may be quashed or dismissed without affecting the remainder. (Willson's Crim. Stats., sec. 2003.)

Another ground of exception urged to the last count in the indictment is that it charges no offense against the law, because it charges defendant with being accessory to a theft committed, not in this State, but in New Mexico. This exception is not a good one. When the principal, Williams, brought the stolen horses into Wilbarger county, he was guilty of the theft of said horses in that county (Penal Code, art. 798), and, such being the law, defendant became an accessory to such theft if he aided the defendant as charged in the indictment. We are of the opinion that there was no error in overruling the exceptions of the defendant to the indictment, nor in overruling his motion in arrest of judgment.

It was not error to permit the State to read in evidence the verdict and judgment showing the conviction of Williams of the theft to which defendant was charged with being accessory. It was essential that the State should prove the conviction of the principal, because said principal, being in custody, had to be tried and convicted before the accessory could be tried and convicted. (Penal Code, art. 90.) And for this purpose, if for no other, the verdict and judgment were admissible in evidence.

Several bills of exception in the record complain of other errors committed in the admission of evidence. We have carefully considered the questions presented by the bills, and without referring to them separately, and without consuming time in their discussion, we will merely state that our conclusion is that in his rulings upon evidence the trial court committed no material error.

We have also examined the charge of the court in the light of the objections made to it by the defendant, and we think it explained to the jury the law of the case sufficiently and correctly, and that the special instructions requested by defendant were properly refused.

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Statement of the case.

We have also carefully considered the evidence in the case, and, in our judgment, it supports the conviction. The judgment is affirmed.

Affirmed.

Opinion delivered April 13, 1889.

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No. 6227.

CHARLES LEE v. THE STATE.

THEFT—POSSESSION OF RECENTLY STOLEN PROPERTY—CHARGE OF THE COURT.—The rule has been announced in repeated decisions of this court that the possession of recently stolen property is not of itself proof positive of theft, but that the proof of such possession, "however recent, and whether explained or not, is merely a fact or circumstance to be considered by the jury, in connection with all the other facts submitted to them, in determining the guilt of the possessor." The same rule requires that when the accused, upon being first challenged, offers an explanation of his possession, it devolves upon the court to instruct the jury as to the effect of such explanation;—that is, if the explanation is reasonable, it will prevail as against the naked possession unless rebutted by the State. The presumption of guilt which attends possession of stolen property is a presumption of fact for the jury, and not of law. In this case the charge of the court, otherwise correct, instructed the jury that the "possession of recently stolen property is presumptive evidence of guilt." *Held*, error. See the opinion in extenso on the subject.

APPEAL from the District Court of Dallas. Tried below before the Hon. R. E. Burke.

The conviction was for the theft of personal property of the value of twenty dollars and over. The penalty assessed was a term of two years in the penitentiary.

The prosecuting witness, who was the proprietor of the Crutchfield Hotel in the city of Dallas, testified, in substance, that a number of articles, including a lady's skirt, a bedspread, and a trunk which contained among other things a scarf and a red handkerchief, aggregating a value in excess of twenty dollars, were stolen from his said hotel between three and seven o'clock on the morning of (or about) December 1, 1888,—that

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morning being Friday. On Sunday morning witness met defendant on the street, wearing the scarf around his neck. He summoned an officer, and accosted defendant, asking him where he got the scarf. Defendant replied that he found the scarf and red handkerchief (which he produced from his pocket, and which the witness identified as the one that was in the trunk when it was taken,) in the Trinity river bottom. He was then arrested, and the officer asked him where the other things were. He replied that they were at a certain saloon, to which he guided the witness and the officer. Arrived at the saloon, he got a bundle and delivered it to witness, who on opening it found it to contain the lady's skirt and bedspread.

The proprietor of the saloon testified, for the State, that the defendant came into the saloon early on Friday morning, and asked permission to leave his bundle. Witness granted the permission. He did not know what the bundle contained until it was delivered to and opened by the prosecuting witness on Sunday morning.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction is for the theft of a trunk, blankets, quilts, bed spreads and divers other articles, amounting in value to over twenty dollars.

The State relied alone upon recent possession of a part of the goods, without reasonable explanation of possession; that is, that appellant's explanation was not reasonable. Upon this matter the learned judge instructed the jury: "Possession of property recently stolen is presumptive evidence of guilt, but, to warrant this presumption from the circumstances of possession alone, such possession must be recent—must be personal and exclusive, and must be unexplained; but if, the first time the defendant's right to said property was called in question, he gave a natural, reasonable, and satisfactory explanation of his possession, it then devolves upon the State to prove such explanation false, and if such explanation be not shown to be false, further evidence of the defendant's guilt will be required."

That possession of property recently stolen is presumptive evidence of guilt as contradistinguished from positive or direct

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evidence is unquestionably true. Nor could there be in any case danger to the accused for the court to simply instruct the jury that such was the character of the evidence; that is, to inform the jury that possession of property recently stolen is not positive but circumstantial or presumptive evidence.

But, to instruct that such possession is presumptive evidence of guilt may not be proper, and may work serious injury to the accused. If the jury should understand the court as merely intending, by such instruction, to draw the distinction between positive and presumptive evidence, then there would be no harm; but if they should believe from such instruction, as a rule of law by which they must be governed, they should presume guilt, or that the law presumes guilt when recent possession is shown and the accused fails to explain his possession, then, we say, if such should be their opinion of the charge, a wrong impression would be made upon the minds of the jury, though the possession be recent and unexplained. The instruction quoted, being so framed as to be regarded in the light of the last proposition, was erroneous; and, when viewed in connection with the other facts in this case, was such error as was reasonably calculated to injure the rights of the accused.

The rule which has been repeatedly stated by this court, following Terry v. The State (41 Texas, 483), is that "proof of the possession of property, however recent, and whether explained or not, is merely a fact or circumstance to be considered by the jury in connection with all the other facts submitted to them, in determining the guilt of the possessor." While this is so, the court should not fail, when the accused explained or accounted for his possession, to properly instruct the jury as to the effect of such evidence. Upon this point the court charged correctly.

We deem it necessary here to make some observations upon this subject. Under our code the judge shall not discuss the facts, nor charge upon the weight of the evidence; and this being a question of fact and not of law, any instruction given as to the effect of, or presumption arising from, other facts proved, is not permitted by the code. But while the court is not permitted to draw conclusions or make presumptions from other facts, it does not follow that the jury can not; on the contrary, this is their duty as well as province.

Let us illustrate. "A" is on trial for theft. The State proves that he was found in exclusive possession of the stolen prop-

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Statement of the case.

erty; that his possession was sufficiently recent to call upon him to account for his possession; that an explanation was directly or constructively demanded of him, and that he failed to explain. These are all the facts in the case bearing upon the fact as to whether or not he was the taker of the property. Now as a matter of fact, not of law, the presumption would arise that he was the person who took the property, and the jury would be authorized to make such presumption and convict him. But while this is so, it does not follow that the court can instruct the jury to make such conclusion and convict; nor can the court tell the jury that the law engrafts upon such a state of case such a presumption.

Appellant insists that the evidence is not sufficient to sustain the verdict. We will not discuss the evidence, remarking, however, that we have some doubts as to its sufficiency. For the error in the charge noted above, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered April 13, 1889.

No. 6287.

FREDERICK JUNIPER *v.* THE STATE.

COMPLAINT—INFORMATION—VARIANCE.—The complaint impleads *John* Juniper, and the information *Frederick* Juniper. *Held*, that the variance is fatal to the information.

APPEAL from the County Court of Dallas. Tried below before the Hon. E. G. Bower.

The appellant was convicted for maintaining a nuisance in violation of the public health laws; his penalty was assessed at a fine of one hundred dollars.

Evans & Gooch, for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Syllabus.

WILLSON, JUDGE. There is no complaint in the record to support the information. The information charges *Frederick* Juniper. There is a complaint in the record charging *John* Juniper, but none charging *Frederick* Juniper, with the offense charged in the information. This variance between the complaint and the information is fatal and requires the conviction to be set aside. (McDevro v. The State, 23 Tex. Ct. App., 429.) This defect is confessed by the Assistant Attorney General.

The judgment is reversed and the cause is remanded for such further proceedings as the State may see proper to pursue.

Reversed and remanded.

Opinion delivered April 20, 1889.

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No. 6308.

J. W. CUNNINGHAM v. THE STATE.

1. THEFT—EVIDENCE.—The indictment charged the defendant with the theft in Dallas county, Texas, of a "coupon railroad ticket, which said ticket entitled the holder thereof to one first class passage from Caldwell in Burleson county, Texas, to New York City by way of Purcell, Kansas City, Quincy, Chicago and Buffalo," the said ticket being the property of the Gulf, Colorado & Santa Fe Railway, and of the value of fifty-seven dollars. The State's witness Cade testified that the value of the ticket, as representing and good for the fare over the said line from Caldwell to New York, was fifty-seven dollars, and that as representing the fare from Dallas to New York, deducting the fare from Caldwell to Dallas, it was fifty two dollars. The State's witness Hirsch testified that the ticket, as representing the price of a first class fare from Dallas to New York, was worth in Dallas the sum of fifty five dollars; to all of which testimony the defense objected that the market value of the said ticket in Dallas was the one question at issue. But *held* that, in view of Hirsch's further testimony that he paid the defendant twenty-five dollars for the ticket, the admission of the evidence, if erroneous, constituted immaterial and harmless error.

2. SAME.—The defense offered in evidence a letter addressed by the general passenger agent of the Gulf, Colorado & Santa Fe Railway to the conductors on the lines of the said railway, notifying them of the theft of the said ticket, and directing them to take up the same if offered for fare, cancel the same and return it to the office of the writer. *Held*, that the letter being relevant to no issue in the case, was properly excluded.

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Statement of the case.

3. SAME—CHARGE OF THE COURT.—There was no contest or dispute as to the ownership of the said ticket, which fact was proved as alleged in the indictment. In this state of the case, and in the absence of a requested instruction to supply the omission, the failure of the trial court to instruct the jury that the ownership must be proved as alleged was error without prejudice.

4. SAME—PRACTICE—FELONIOUS AND MISDEMEANOR THEFT.—Exception to a charge of the court based upon an erroneous statement of a principle of law will necessitate the reversal of a conviction without inquiry as to the effect of such error on the jury. In this case the charge misdirected the jury as to the value which determines the grade of theft. Moreover, all of the proof in the case shows that the theft, if theft was committed, was a felonious theft, and the court therefore erred in charging at all on misdemeanor theft—the rule being that the court shall charge only upon issues presented by the evidence.

5. SAME.—If the accused acquired *lawful* possession of the stolen property, he can not be convicted of theft unless it is shown that he obtained such possession by false pretext, or with intent, at the very time he obtained such possession, to deprive the owner of its value, and to appropriate it to his own use, and further, that he did so appropriate it. A charge of the court which authorized conviction upon proof that the fraudulent intent was conceived *after* lawful possession was acquired was error.

APPEAL from the District Court of Dallas. Tried below before the Hon. R. E. Burke.

This conviction was for the theft of a railway passenger ticket, of a value exceeding twenty dollars. The penalty assessed was a term of two years in the penitentiary.

The fact that the appellant stole the ticket from the office of the railway company in Caldwell, Burleson county, and sold it in Dallas, was not contested, but the defendant's confession of the theft was proved. The sole contention on the trial arose over the value of the ticket in Dallas, if it had value at all. The witnesses concurred in stating that if it was good for the fare to New York, as it purported to be, it was worth from fifty-two to fifty-five dollars in Dallas, and employes of the railway company testified that the said ticket entitled the holder to one first-class fare to New York from Caldwell.

No brief on file for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

WHITE, PRESIDING JUDGE. 1. The witness Hirsch swore positively that the railroad ticket was purchased by him in Dallas for twenty-five dollars and that it was worth in Dallas fifty-five dollars. This fact having been thus proven by said witness renders immaterial appellant's first three bills of exceptions reserved as to the admission of evidence of value over his objections, and if in any manner erroneous, the error is without prejudice and harmless.

2. There was no error in excluding the letter of Cark, the general passenger agent of the railroad, notifying conductors that ticket had been stolen, and instructing them to take up, cancel and return the same to his office. The rejected evidence could throw no possible light upon the transaction under investigation.

3. Several objections to the charge of the court to the jury were saved by bills of exception which appear in the record: 1. The ownership of the ticket was averred in the indictment to be in the Gulf, Colorado and Santa Fe Railroad Company, and the court nowhere instructs the jury in terms that they should find the ownership to be proven as charged, in order to convict. But while the charge is perhaps critically obnoxious to the objection, yet, when taken in connection with the fact that there was no question as to the ownership and possession raised by the evidence, and the further fact that the jury were charged as to the necessity of finding all the other essential ingredients and the elements of a theft of property stolen from the possession of said railroad company, we do not think the omission complained of would be reversible error in the absense of a refused special requested instruction supplying the defect or omission. There was no contest or dispute as to the ownership and possession; it was fully proven as alleged, and the jury could not possibly have been misled nor the accused in any manner prejudiced by the omission to charge in terms the necessity of finding the fact as alleged and proven. Had there been any question as to ownership, the objection would doubtless have been fatal. (Kay v. The State, 40 Texas, 29; Bray v. The State, 41 Texas, 560; Williams v. The State, 4 Texas Ct. App., 5; Robinson v. The State, 5 Texas Ct. App., 519; Smith v. The State, 7 Texas Ct. App., 382.)

2. With regard to the value of the ticket, the jury were instructed that if they believed the theft had been committed in Burleson county, and the property was brought by defendant

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into Dallas county, "but that the market value of the ticket at Dallas, Texas, *was not over* twenty dollars, or, if you have in your mind a reasonable doubt, from the evidence, as to whether the ticket was over the value of twenty dollars, then you should find him guilty of a misdemeanor," etc. The charge is erroneous in that the statute makes it a felony to steal property of the value of twenty dollars, and does not require that the value should be *over* that amount. (Penal Code, arts. 735, 736.) The instruction was favorable to the defendant, but, being erroneous and excepted to at the time, the error is fatal. If error of law occurs in the charge as given, no matter how immaterial it may be, if it is promptly excepted to and presented by a proper bill of exception on appeal, the statute (Code Crim. Proc., art. 685) is mandatory that the conviction shall be set aside without inquiry as to the effect of such error upon the jury. (Willson's Crim. Stats., sec. 2363.)

3. Another portion of the charge which was excepted to was as follows: "But if you are satisfied that, although the ticket came into his (defendant's) possession by lawful means, and you are further satisfied from the evidence beyond a reasonable doubt that the defendant afterward took the ticket with the intent to deprive the railway company of the value thereof and appropriate the same to his own use and benefit, and the same was so appropriated, the offense of theft is complete." This instruction was erroneous. The correct rule is that "when the *taking* of the property was originally *lawful*, that is, when the property came into the possession of the accused not *wrongfully*, but *lawfully*, a conviction for theft can not be sustained unless it be shown that the accused obtained the property by some false pretext, or with the intent, at the very time of obtaining the property, of depriving the owner of the value thereof and appropriating the property to the use and benefit of the person taking; and it must further appear that the property was so appropriated." "The fraudulent intent must exist at the very time of acquiring the possession of the property. No subsequent fraudulent intent or appropriation of the property will suffice to constitute the original lawful taking theft." (Willson's Crim. Stats., sec. 1269; Taylor v. The State, 25 Texas Ct. App., 96; Guest v. The State, 24 Texas Ct. App., 235; Penal Code, art. 727.)

4. The charge was also specially excepted to because it submitted the issue of petty or misdemeanor theft, that is,

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Statement of the case.

theft of property under the value of twenty dollars, there being no evidence calling for such a charge, and all the testimony going to show that the ticket, if worth anything at all, was worth more than twenty dollars. This exception is also well taken. A charge which submits issues not raised by the evidence is erroneous, and, when excepted to as in this case, such error is reversible.

For errors in the charge of the court above pointed out and discussed, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered April 20, 1889.

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No. 6346.

G. H. BERRY v. THE STATE.

SLANDER — EVIDENCE — PRACTICE. — An information for slander by imputing to a female a want of chastity should allege, at least in substance, the language actually used by the accused, and to that language the proof should be confined. If the meaning of the language as charged be obscure, then the information should allege its meaning; otherwise proof of its meaning is not admissible. The meaning of the language charged by the information in this case is clear and unambiguous, but the language proved is not only variant from that alleged, but is obscure in meaning. The trial court permitted a State's witness to testify that he understood the language used by the accused to correspond in meaning with that charged in the information. *Held*, error. See the opinion for the substance of evidence *held* insufficient to support a conviction for slander because it does not support the allegations in the information.

APPEAL from the County Court of Knox. Tried below before the Hon. J. J. Truscott, County Judge.

The opinion discloses the case. The penalty assessed against the appellant was a fine of two hundred and fifty dollars, and confinement in the county jail for thirty days.

E. J. Hamner, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

WILLSON, JUDGE. It is charged in the complaint and information that the defendant slandered Isabella Helm, an unmarried female, by saying that she "was in the family way, meaning thereby that she was with child, and that he believed her brother, F. B. Helm, was the father of the child." There is no evidence proving that he used the precise language above stated. He said on one occasion that "he had seen Isabella Helm at home, and if there was not something wrong with her his eyes had fooled him; that he saw enough to convince him that there was something wrong with her; that if his eyes had not deceived him worse than they ever had before, she was in that condition." On another occasion he was asked by a neighbor and brother in the church if he had heard any bad reports about Isabella Helm, and, if so, what the reports were. He answered that it was *reported* that she was in the family way, and that it was *reported* that her brother Frank was the other party concerned.

The trial judge, over the defendant's objections, permitted the witness who testified about the language used by defendant on the first occasion above referred to, to testify that they understood him to mean by the words "that condition" that Isabella Helm was in the "family way." We think this was error. The language used by him on said occasion does not of itself correspond, even substantially, with that charged in the complaint and information. He did not say that Isabella Helm was in the family way, or with child, and that he believed her brother Frank was the father of the child. The language used by him may have been intended to, and no doubt did, convey the meaning that she was pregnant, but, not being so alleged in the complaint or information, it was not permissible to prove that such language had any other meaning than that plainly expressed by the words. The complaint and information should have alleged the language actually used by the defendant, at least in substance, and its meaning, not being clear, should have been alleged, and it would have been permissible to prove its meaning in the manner permitted by the court.

With respect to the language used by the defendant on the other occasion referred to, it does not correspond with that charged in the complaint and information either literally or substantially. He did not say that Isabella Helm was in the family way, and that he believed her brother Frank was the father of the child. He said it was so *reported.*

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Statement of the case.

We are of the opinion that the evidence legitimately admitted does not prove the slander as it is alleged in the complaint and information. The slander proved, if any, is not the slander alleged. (Stichtd v. The State, 25 Texas Ct. App., 420; Frisby v. The State, 26 Texas Ct. App., 180.)

Numerous errors are assigned to which we have given consideration. We have been unable, however, to perceive any error in the rulings or charge of the court, except the one we have discussed, and because of that error, and because the evidence does not sustain the allegations, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered April 24, 1889.

No. 6353.

EX PARTE DICK DUNCAN.

HABEAS CORPUS FOR BAIL—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a judgment refusing bail,—murder being the offense charged against the relator.

HABEAS CORPUS on appeal from the District Court of Burnet. Tried below before the Hon. W. A. Blackburn.

The judgment of the lower court refusing bail to the relator is reversed, and bail is awarded him in the sum of six thousand dollars.

The first witness called to the stand was George B. Dunn. He testified that he lived in Eagle Pass, and was the justice of the peace in and for precinct number one of Maverick county. He held an inquest upon four dead human bodies found in the Rio Grande, and upon a complaint filed before him, he issued the warrant upon which the relator and Tap Duncan were arrested for the murder of the said parties. The first of said bodies was found on February 26, 1889; two others were found on February 28, 1889, and the fourth on March 2, 1889. They were all found on the American shore within six hundred yards of each other. Three were the bodies of females; two women

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and a girl, and the other of a youth nineteen or twenty years of age. The skull of each was crushed in, evidently by blows from a blunt instrument. Large stones, weighing from thirty to fifty pounds, were attached to each of the bodies. The oldest of the four was a woman between forty-five and fifty years of age; the next a young woman twenty-eight or thirty years of age; the third in age was the boy, and the youngest was the body of a girl sixteen or seventeen years of age. Decomposition had so far advanced that it was impossible to tell anything about the features or complexion of the deceased parties. The hair of each was dark. From the pocket of the boy the witness took the pocket knife produced in court, marked M. F. & S. on both sides. After the bodies had been buried seven or eight days, that of the young woman—the second in age—was disintered, and from her mouth was taken the gold plate now in evidence, which had originally contained two teeth, one of which had been long missing. The bodies were barely moving with the current when discovered.

Joe S. Clark testified, for the State, that he lived in the town of San Saba, San Saba county, Texas, where he was engaged in selling wagons, agricultural implements, etc. On the twenty-second day of January, 1889, the witness sold to the relator a new "two and three-fourths inch Mitchell wagon, a set of wagon harness and a wagon sheet and bows." On the said wagon was printed the witness's business advertisement, as follows: "Sold by Joe S. Clark, San Saba." The relator did not take the wagon away on the day that he bought it, nor did the witness see him when he took it away.

Ed Hawkins testified, for the State, that he lived in San Saba county, Texas, and was acquainted with the Williamson family. The Williamsons lived within four hundred yards of the witness. The family consisted of "old" Mrs. Williamson, a widow lady, aged about fifty years; her widowed daughter, Lavonia Holmes, commonly called "Boney" Holmes, aged about thirty years; her son Ben Williamson, aged about twenty years, and her daughter Beulah Williamson, aged about sixteen years. A few days before the Williamson family left or disappeared from San Saba county, the relator told the witness that he had bought the Williamson place, and that he was going to let Mrs. Williamson have a new wagon and harness that he had recently bought, and two horses, in part payment for the place. The Williamson family disappeared from

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Statement of the case.

their place in San Saba county about January 25, 1889. On the night they disappeared, witness heard a wagon pass his house and stop at the Williamson place. Soon afterwards a horse passed going in the same direction. Later in the night the wagon left the Williamson place. Witness had never seen any of the Williamsons since that night. Witness did not know who was driving the wagon that passed his house, nor who, if anybody, was riding the horse. On his cross examination he said that he did not know as a matter of fact that the relator traded for the Williamson place, nor what, if anything, he paid for it. Relator lived between three and four miles from the witness. He was in witness's neighborhood three or four days after the Williamsons disappeared.

Tom Hawkins testified, for the State, that he lived within four hundred yards of the Williamson family in San Saba county. One night late in January, 1889, a wagon, traveling from the "general" direction in which the relator lived, passed the witness's house, and stopped at the Williamson place. Soon afterwards a horse passed, going in the same direction. The wagon remained at the Williamson place about two hours, during which time the witness heard a noise which sounded like the loading of a wagon. The Williamson family were gone on the next morning. During the forenoon of the said morning the relator, with Jim McDonnell and Hugh Harkley, in a wagon containing a bedstead and sofa, passed witness's shop, traveling from the Williamson place. Relator asked witness: "What have you done with your neighbors?" Witness replied: "They have gone, but I suppose will come back again;" to which the relator replied: "I'll be damned if they ever come back."

Frank Ward testified, for the State, that he lived in San Saba county, and knew the Williamson family, the individuals of which he described as did the witness Hawkins. Mrs. Boney Holmes wore a gold plate in her mouth which originally held two false front teeth. It contained but one at the time of her disappearance. The witness had often seen that gold plate, and had held it in his hands. The gold plate exhibited to witness was the same plate, or its exact counterpart, that Boney Holmes wore in her mouth.

John R. Hughes testified, for the State, that he was a State ranger. On the sixth day of February, 1889, the relator came to Camp Woods, in Edwards county, where the rangers were,

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ate dinner with them, and remained about four hours. He said that he had come from San Angelo, and was going to Eagle Pass; that he was traveling with a family named Jones who were going to or near Brackett. On the same day, but after the relator left, a man who said his name was Jones came to the camp hunting horses. On the following morning, at a point about three quarters of a mile from the camp, the witness and his party met the relator and the man Jones, one riding a bay and the other a sorrel horse. They were about three hundred yards in advance of a two-horse wagon, which the relator said was his "outfit." When the wagon came up, witness saw that it was a new vehicle, and showed by words printed on it that it came from San Saba. It was driven by a young man eighteen or twenty years old, and contained three females who corresponded with the Williamson women as described by the witness Hawkins. The party was traveling south, and the relator said that he was going after horses. The man called Jones was not Tap Duncan, the brother of the relator. On or about March 1, 1889, the witness saw the relator, and old man Duncan and Tap Duncan on the east prong of the Nueces river in Edwards county. They were going north towards Junction City, in Kimble county. The point on the east prong of the Nueces river, where witness saw the Duncans, was about one hundred and fifty miles from Eagle Pass, in Maverick county. The said parties then had Winchesters and pistols, and were arrested for carrying the latter. Sergeant Aten told the relator that whatever statement he might make in regard to a matter he intended to inquire about could be used in evidence against him, and then asked him who the parties were that he moved down the country some time before. Relator replied: "One was Cravey's wife, my sister; the other was my sister, the wife of Thompson. Thompson is the man who drove the wagon. He is on the dodge about a little cow case; you don't blame me for that, do you?" On the following morning relator said that the old woman of the party he took down was his mother, and that the correct name of the man Jones who went down with him was H. W. Landers. Sergeant C. G. Aten testified, for the State, substantially as did the witness Hughes.

Tom Selman testified, for the State, that between February 9 and 12, 1889, he saw three men and three women in camp, about nine miles east of Brackett, in Kinney county, Texas They had a new wagon, which the witness did not particularly

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Statement of the case.

notice. The women, in age, suited the description of the Williamson women as given by preceding witnesses. Witness talked with one of the men, who looked to be twenty-eight or thirty years old. In the course of that conversation, that man said his name was Williamson. Witness had never seen that man nor the women since. About February 19, the witness saw the other two men in Brackett. To the best of his belief the relator was one of those two men.

James Nolan testified, for the State, that he was the sheriff of Kinney county. He saw the relator and another young man in Brackett, Kinney county, on the tenth day of February, 1889, and saw relator again on the next morning, when he was introduced to the relator as Dick Duncan. Witness remarked to him: "I saw you yesterday with another young man." He replied: "Yes—with Landers." On the said tenth day of February relator was riding a bay and Landers a sorrel horse. Witness remarked to relator: "I knew your father when he lived in Kinney county." Relator replied: "He now lives below Eagle Pass, and I am now on my way to visit him. I have a wagon camped out of town."

George Hobbs testified, for the State, that he kept a store in Spofford, Kinney county, Texas. On February 11, 1889, the relator and another man came to his store and inquired the way to Eagle Pass. About the twentieth day of the same month the relator came to witness's store, and left his horse and Winchester rifle and went to Eagle Pass on the train, returning three or four days later with his father and his brother Tap. When he left, the relator said that he was going back to Eagle Pass to sell his horse. When he brought his gun to witness's store on February 20, witness noticed that it was bent about the magazine. Relator said that he bent it by striking a jack over the head with it.

W. W. Collins testified, for the State, that on February 9 or 10, 1889, he saw a two horse wagon, containing a young man and three women, near Spofford, going towards Eagle Pass. A sorrel horse was tied behind the wagon. On the next day the relator rode into Spofford on a bay horse from the direction of Brackett. He had his Winchester gun with him. Witness got a good view of the gun and was positive that it was in perfect repair then. Three or four days later the relator returned to Spofford from the direction of Eagle Pass, riding the sorrel horse that passed through Spofford when tied behind the

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wagon. His Winchester gun was then badly bent about the magazine. Eagle Pass was about thirty-five miles distant from Spofford. J. C. Yates testified, for the State, as did Collins, except that he said nothing about the Winchester gun.

Fred Berndt testified, for the State, that he lived in Piedras Negras, in Mexico, opposite the town of Eagle Pass, in Texas. The relator came alone to the witness's ranch on the twelfth or thirteenth day of February, 1889. His brother, Tap Duncan, was then at the witness's ranch, and had been for ten or twelve days. Relator told witness that he had come from San Saba to Eagle Pass to visit his sister, Mrs. Cravey, who had been in Eagle Pass since February 1. He also said that he left his two partners near Brackett. He said that one of his partners was named Landers. The witness had forgotten the name of his other partner as given by relator. He remained one day and left, returned on the sixteenth, remained over night, and left. He came back on the twenty-first and took his sister's things from the ranch to Eagle Pass. Witness was with Tap Duncan every day from February 1 to February 22.

W. J. Brown testified, for the State, that he lived in Kinney county on the West Nueces. On or about February 23, 1889, the relator came to the witness's house inquiring for a man and wagon camped in the vicinity. He passed the night with witness; his actions aroused the witness's suspicions. He appeared restless and uneasy. He said that he came from San Angelo and was going to Junction City. Witness told him he was on the wrong road, and he then said he was going to McKavett, and witness told him he was on the right road. He then said that he had been to Mexico after stolen horses; that he was followed, arrested, jailed, fined forty-five dollars, and deprived of his pistol; and that on the advice of the American consul he crossed the river. He then said that he wanted to go to Camp San Saba. Several days afterwards, old man Duncan and Tap Duncan, the father and brother of the relator, traveling in an old wagon, came to witness's house.

Tom Perry testified, for the State, that he was at W. J. Brown's house on February 23, 1889, when the relator came there as testified by Brown. His narrative corresponded with Brown's except that relator told him that he had spent the winter on Devil's river, hunting.

Albert Schwander testified, for the State, that he lived a few miles distant from the witness Brown. On or about February 18,

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Statement of the case.

1889, a man with a new wagon camped near the witness's place. On or about February 24, 1889, that man was joined by the appellant. They told witness that they were waiting for another wagon and two men, and they put four horses in the witness's pasture. Relator soon afterwards went off down the river, and in a day or two returned ahead of two other parties traveling in an old wagon. The man who camped near witness's place with the relator claimed his name to be Landers.

Louis Charles testified, for the State, that he lived near the witness Schwander's house in Kinney county. One day late in February, 1889, a man came to the witness's house and offered to sell witness a mattress. The witness went with him to the house of a Mexican to see the mattress, and when he got there he found the relator. Thence witness, relator and the other man went to a camp near Schwander's field, where the mattress was shown to witness. Witness did not buy it; but bought a quilt from the relator. There were six or seven quilts in the wagon, all somewhat worn but clean.

A. W. Haley testified, for the State, that he lived near Barksdale, in Edwards county. The relator came to witness's place on February 27, 1889, and asked the way to Junction City, and if there was a way to that town that did not lead through Barksdale. He then asked witness to tell his father and brother, who would soon pass in a wagon, to go through Barksdale, which the witness did. Relator's gun was then bent at the magazine. He said he had struck a jack over the head with it.

Sam Thurman testified that on March 10 or 11, 1889, he met a party of three men and a boy near Fredonia, in Mason county, going toward San Saba. He took the relator to be one of those parties. He had a Winchester that was bent about the magazine. There were two wagons in the party. Witness took no special notice of the wagons.

W. N. Cook, sheriff of Maverick county, testified that he saw the relator in Mexico, across the Rio Grande from Eagle Pass, on February 20 or 21, 1889, and on the next day saw him in Eagle Pass. He saw the bodies found in the river, which he described substantially as did the preceding witnesses.

The State closed.

Hugh Harkley testified, for the relator, that he was with the relator and Jim McDonnell on the morning after the Williamson family left San Saba county, and heard the conversation

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between the relator and the State's witness Hawkins. Hawkins remarked that the Williamsons would be back within a month. The relator replied that he did not think they would come back, as he had bought their place and they had no place in the neighborhood to occupy. Relator did not say "I'll be damned if they ever come back."

On cross examination, this witness denied that he ever told S. B. Howard that relator, in reply to Hawkins, said: "I'll be damned if they ever come back;" or that he told said Howard that, when taking down the bed in the Williamson house on the morning after the family left, the relator remarked that he had several times had sexual intercourse with the little girl on that bed.

S. B. Howard, when called by the State in rebuttal, contradicted the witness Harkley in his denial of the two statements imputed to him.

No brief on file for the relator.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. As presented to us in the record, the proof is not evident that the applicant committed the horrible murders with which he stands charged. We, therefore, reverse the judgment denying him bail, and grant him bail in the sum of six thousand dollars, upon giving which, in accordance with the law in such case provided, he will be released from custody.

Ordered accordingly.

Opinion delivered April 24, 1889.

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No. 6354.

EX PARTE JOE MURPHY.

1. PRACTICE—CONSTRUCTION OF STATUTES.—In construing statutory enactments the courts must so interpret the legislative intent as to harmonize the provisions of the act with the Constitution, if it can be reasonably done.

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Opinion of the court.

2. SAME—TERMS OF THE DISTRICT COURT OF KARNES COUNTY—CONSTITUTIONALITY OF A STATUTE.—The relator was convicted of a felony at a term of the district court of Karnes county which, under the law of 1885, began on the eighth day of April, 1889. Seeking by habeas corpus to avoid the execution of the sentence then pronounced against him, he shows that, by the act of April 2, 1889, to which an emergency clause was appended, the time of the holding of the terms of the said district court was changed to the fourth Monday in March:—his contention being that, by reason of the said enactment of April 2, 1889, he was tried and convicted at a time when a legal term of the said district court could not be held. *Held* that, notwithstanding the emergency clause appended to the act of April 2, 1889, the said act did not operate to invalidate the term of the court which began on April 8. The said act is constitutional, but, the emergency clause to the contrary notwithstanding, it did not take effect until such time as would not deprive any county in the judicial district of its constitutional right to two terms per annum of the district court.

HABEAS CORPUS on appeal from a judgment in chambers by the Hon. H. C. Pleasants, Judge of the Twenty-fourth Judicial District, remanding the relator to the custody of the sheriff of Karnes county.

The opinion discloses the case.

F. R. Graves, for the relator.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. On the fifth Monday after the first Monday in March, 1889, being the eighth day of April, a term of the district court for Karnes county was begun and held in said county, and at said term the applicant Joe Murphy was convicted and sentenced for the felony of incest. He applied to the Hon. H. C. Pleasants, judge of said court, for the writ of *habeas corpus*, which was granted, and upon a hearing of said writ he was remanded to the custody of the sheriff of said county, that said sentence might be executed. He has appealed to this court, insisting that said conviction is illegal and void, because obtained and rendered at a time when a legal term of the district court of Karnes county could not be held.

The facts are that the said term of court was held at the time fixed by the act of 1885 (Laws, 1885, p. 8); that is, commencing on the fifth after the first Monday in March. On April 2, 1889, six days prior to the convening of said term on

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Opinion of the court.

April 8, an act was passed by the legislature changing the time of holding said court in said county to the fourth Monday in March. This act contains an emergency clause, and declares that it shall take effect from its passage. Applicant contends that after the passage of said act of April 2, 1889, a legal term of the district court for Karnes county could not be held except at the times prescribed by said act.

We are of the opinion that the term of said court at which the conviction was had was a legal term. If it were held otherwise, the effect would be to deprive Karnes county of one term of said court for the present year, when the Constitution declares that *two* terms of the district court *shall* be held each year in each county. (Const., art. 5, sec. 7.) In construing an act of the legislature, it is the duty of a court to so interpret the legislative intent as to harmonize the provisions of the act with the Constitution, if this can be done reasonably. It must be presumed that the Legislature did not intend to disregard the above cited provision of the Constitution by depriving Karnes, or any other county in the district, of the constitutional right to have two terms of the district court each year. If such was the intent, the act would be void, and the courts in that district would have to continue to be held at the times fixed by the old law.

Notwithstanding the emergency clause in said act of April 2, we feel justified in holding that it was not the legislative intent that said act should immediately take effect, but that it should become operative only at a time when it would not deprive any county in the district of its two terms of court. In this view we are sustained by Womack v. Womack, 17 Texas, 1, and by Graves v. The State, 6 Texas Court of Appeals, 228, which decisions are in point, and, we think, are conclusive of the question in this case. We therefore conclude that the act of April 2, 1889, is constitutional, but that it does not take effect so as to interfere with the holding of the district courts in said district, until said courts can be held at the dates there in fixed, without depriving any county in said district of two terms of said court during the present year.

The judgment remanding appellant to the custody of the sheriff is affirmed.

Affirmed.

Opinion delivered April 24, 1889.

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No. 6204.

GEORGE BLACK v. THE STATE.

PRACTICE—NEW TRIAL.—If, after conviction, it appears that the absent testimony (to secure which the application for continuance discloses due diligence) was both material, and, in the light of the proof on the trial, probably true, a new trial should be awarded.

APPEAL from the District Court of Wilson. Tried below before the Hon. George McCormick.

The conviction in this case was for unlawfully carrying a pistol, and the penalty assessed by the verdict was a fine of twenty-five dollars, and twenty days in the county jail.

A single witness testified, for the State, that he saw defendant carrying a pistol on his person on the day alleged in the indictment.

The defense introduced no evidence but disclosed its defense in the application for continuance, which was that he purchased the pistol and was taking it home at the time he was seen carrying it on his person. He proposed to prove that fact by his brother, and by the person who sold him the pistol. For diligence he showed that, on the day that he was arrested, he sued out a subpœna for the person who sold him the pistol, the said person being a resident of Wilson county; and that on the same day he sued out an attachment to Gonzales county for his brother, who, he showed, was unable to attend because of a recently fractured arm.

B. F. Ballard, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. We think the court erred in refusing the defendant a new trial. His application for a continuance was a first one, and was in compliance with the statute both in form and substance. It showed legal diligence to obtain the absent testimony, and the materiality of such testimony. Viewed in connection with the evidence adduced on the trial, the absent

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testimony would be material to the defendant, as it would tend strongly to establish for him a valid defense, and there being nothing in the testimony adduced on the trial to contradict or render it improbable, we must hold that the facts set forth in the application for a continuance are probably true. (Code Crim. Proc., art. 560, sub div. 6; Willson's Crim. Stat., sec. 2186.)

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered April 27, 1889.

No. 6242.

H. A. TRACY *v.* THE STATE.

1. CARRYING A PISTOL—CHARGE OF THE COURT.—The information charged the appellant with carrying a pistol only, and the evidence on the trial related to the carrying of a pistol only; notwithstanding which the trial court charged the jury with reference to the carrying of a dagger, dirk, slung shot, sword cane, spear, knuckles, etc. *Held* error.
2. SAME.—A charge of the court is erroneous which instructs the jury upon a phase of case not raised by the evidence on the trial.

APPEAL from the County Court of Wichita. Tried below before the Hon. E. W. Foster, County Judge.

The conviction was for carrying a pistol, and the penalty assessed against the appellant was a fine of twenty-five dollars and twenty days in the county jail

F. C. Martin and *A. H. Carrigan*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. The information charges that defendant unlawfully carried upon his person a pistol. He was put upon trial upon this charge alone, and all the evidence introduced related to the carrying of no other weapon than a pistol. In

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Statement of the case.

his charge to the jury the court not only instructed with reference to a pistol, but also as to a dagger, dirk, slung shot, sword cane, spear, knuckles, etc. In fact, he gave in charge to the jury article 318 of the Penal Code, literally and entirely. Defendant promptly excepted to the charge and reserved a proper bill of exceptions.

Said charge is manifestly erroneous because, in part, it is unwarranted by the pleadings and evidence, and is not the law applicable to the case. The charge should have been confined to the specific facts—the specific weapon charged in the information, and to which the evidence related. The error having been excepted to, the judgment must be reversed.

The charge also embraces, literally and in its entirety, article 319 of the Penal Code, which is law not applicable to the evidence in the case, and which should not have been given.

The special instructions requested by the defendant are not the law applicable to the facts in evidence, and were properly refused.

Because of the error in the charge excepted to, as above stated, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered April 27, 1889.

27a 497
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No. 6375.

WILLIAM MILLER v. THE STATE.

PERJURY.—CHARGE OF THE COURT in a perjury case is fundamentally erroneous unless, conforming to article 746 of the Code of Criminal Procedure, it instructs the jury that a conviction for perjury can not be had except upon the testimony of at least two credible witnesses or of one credible witness strongly corroborated by other evidence as to the falsity of the defendant's statements under oath, or upon defendant's confession in open court.

APPEAL from the District Court of Caldwell. Tried below before the Hon. H. Teichmueller.

This conviction was for perjury, and the penalty assessed by the verdict was a term of five years in the penitentiary.

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Syllabus.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This is a conviction for perjury. The indictment is a good one, and the exceptions thereto were properly overruled; as was also the motion in arrest of judgment. There is no statement of facts in the record, and, were it not for a fundamental defect in the charge of the court, the judgment would be affirmed.

The insufficiency in the charge consists in the omission to give in charge to the jury article 746 of the Code of Criminal Procedure, which is an essential part of the law in every perjury case, and must be given in charge whether requested by defendant or not. An omission to give it in charge is fundamental error. (Washington v. The State, 22 Texas Ct. App., 26; Gartman v. The State, 16 Texas Ct. App., 215.)

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered April 27, 1889.

No. 6252.

JAMES LANGAN ET ALS. *v.* THE STATE.

1. RECOGNIZANCE taken after indictment must describe the very offense of which the principal is charged.
2. SAME—PRACTICE—INDICTMENT.—Another equally well settled rule is that neither the principal nor the sureties in a bail bond or recognizance can question the sufficiency of the indictment in a scire facias proceeding to forfeit the same.
3. SAME—CASE STATED.—The recognizance in this case binds the principal to appear on an indictment for assault with intent to rape. The said indictment is insufficient to charge that offense, but is sufficient to charge an aggravated assault and battery. The defendants' motion to quash the recognizance is based upon the ground that it does not obligate the principal to appear and answer the offense charged in the indictment. But *held*, that, as the intent of the indictment to charge assault to rape is manifest, the last rule announced obtains, and the trial court properly overruled the motion.

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Opinion of the court.

APPEAL from the District Court of Wilbarger. Tried below before the Hon. P. M. Stine.

The opinion discloses the case.

Brill & Easton and *Huff & Webb*, for the appellants.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. On the thirtieth of May, 1887, James Langan as principal, with Beard and Hasket as sureties, entered into a recognizance in the sum of one thousand dollars, by which Langan was bound to appear at the proper term of the district court of Wilbarger county to answer the charge, by indictment, of an assault with an intent to commit rape. On May 31, 1887, the cause was called for trial, and Langan failing to appear, a forfeiture was taken. At the November term, 1888, the case came on and the judgment *nisi* was made final against Langan, Beard and Hasket, and they appeal.

First error assigned: Appellants moved to quash the recognizance because the principal therein was not bound to appear and answer the offense charged in the indictment.

Langan was required to appear and answer the charge of an assault with intent to rape. The indictment alleges that "James Langan * * in the county of Wilbarger * * then and there, in and upon Jennie Barnett, a woman, did make an assault with the intent, her, the said Jennie Barnett, by force to carnally know."

This indictment would be good for assault with intent to rape if it had alleged that appellant intended to have carnal knowledge without or against the consent of the prosecutrix. This omission renders the indictment insufficient for that offense, but leaves it sufficient, under the decisions of this court, for an aggravated assault.

Now, it is contended by counsel that as the principal is not required by his recognizance to answer for this offense (aggravated assault), no forfeiture could be legally taken because he failed to so answer.

It is well settled by the decisions both of the Supreme Court and of this court, that the bond or recognizance must describe that offense of which the principal stands charged. (McAdams v. The State, 10 Texas Ct. App., 317; Keppler v. The State, Id.,

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173; McLaren v. The State, 3 Texas Ct. App., 680, and cases cited.)

But on the other hand, it is also settled that neither the sureties nor the principal will be permitted to question the sufficiency of the indictment. Evidently the indictment in this case seeks to charge an assault with intent to commit rape; this was certainly the aim of the pleader. Hence we hold that the case comes under the last rule. If, however, it appeared from the indictment that it was the purpose of the pleader to charge aggravated assault, then we would hold that the first rule should apply. Evidently this is not the case; because aggravated assault is charged, not by the pleader intentionally, but because of the omission to allege that the carnal knowledge was intended without or against consent of the woman.

The law is too well settled against the second proposition to require discussion.

Affirmed.

Opinion delivered May 1, 1889.

No. 6326.

FRED LIDTKE *v.* THE STATE.

1. FALSE PACKING AND SELLING FALSELY PACKED MERCHANDISE.—Article 470 of the Penal Code denounces as guilty of a criminal offense any person who with intent to defraud shall put into any vessel or package containing merchandise or other commodity usually sold by weight, *any article whatever* of less value than the merchandise with which said vessel or package is apparently filled, or any person who, with intent to defraud, shall sell or barter, or give in payment, or expose to sale, or ship for exportation, any such vessel or package of merchandise or other commodity with any such article of inferior *value* concealed therein. Article 471 of the Penal Code denounces as guilty of a criminal offense any person who shall, with intent to deceive and defraud, conceal within any vessel or package containing merchandise or other commodity, any merchandise or commodity of a *quality* inferior to that with which such vessel or package is apparently filled, or any substance of less value, etc. The distinction between the two offenses, construed in connection with each other, is that, whereas the latter offense may be committed by concealing in the vessel or package

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either like merchandise of inferior quality or any substance of less value, the former offense can be committed only by putting into the vessel or package a substance different in character and of less value than that with which the vessel or package is apparently filled; and whereas, it is an offense under article 470 to fraudulently offer for sale the falsely packed vessel or package, the offering for sale under the latter article is not an offense. The indictment in this case is formulated under article 470, and charges the *sale* of four bales of cotton falsely packed with cotton of inferior quality to that with which they were apparently filled. *Held*, that the indictment charges no offense against the law.

2. SAME—EVIDENCE.—If the words "any article whatever," as used in article 470, could, when said article is construed in connection with article 471, be held to include an inferior quality of merchandise of the same kind as that with which the vessel or package is apparently filled, then, before a conviction could be had, it would devolve upon the State to prove that the accused, with respect to said vessel or package, acted with a guilty knowledge. See the opinion for a statement of the proof in this case *held* insufficient for this purpose.

APPEAL from the County Court of Williamson. Tried below before T. B. Cochran, Esq., Special Judge.

The opinion discloses the nature of the case. The penalty assessed against the appellant was a fine of twenty-five dollars.

J. W. Parker, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Appellant is charged by the indictment with unlawfully, with intent to defraud, exposing to sale, and that he did sell, barter and give in payment to J. W. Womack, J. P. Sturgis and F. L. Welch, comprising the firm of Womack, Sturgis & Co., four bales of cotton, containing merchandise, and a commodity usually sold by weight, to wit: cotton, into which said bales had been put and concealed therein an article and grade of cotton of less value than the merchandise and commodity with which said bales were then and there apparently filled, to wit: with a quality of cheap inferior cotton, the same being so packed as to conceal the said inferior and lower grade cotton, the said Lidtke then and there knowing that the said cotton of inferior value had been put and concealed in said bales.

The cause was tried by the judge without a jury. The learned

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judge found that the accused was guilty of "falsely packing merchandise as charged in the indictment," and adjudged appellant guilty of said offense, assessing the punishment at a fine of twenty-five dollars.

Appellant is not charged with falsely packing merchandise. He is charged with selling four bales of cotton which he knew were falsely packed with inferior cotton to that with which the bales were apparently filled.

But let us concede that the court intended to find him guilty of selling the four bales so falsely packed—that we should make this inference from that part of the finding which adds "as charged in the indictment." The question then arises as to the sufficiency of the evidence to establish the guilty knowledge of appellant. Do the facts show with reasonable certainty that appellant knew that the bales were so packed?

Conceding that there was cotton packed in the bales of inferior grade to that with which they were apparently filled, still the evidence in the case clearly shows that this might have occurred purely from accident and without the knowledge of appellant or any other person.

Again, admitting that the bales were so packed, there is no testimony showing with reasonable certainty that appellant was aware of the fact. It is true that when asked by Womack if the cotton averaged the same throughout, he said it did with the exception of two bales, which contained some five or six hundred pounds which was gathered after the rain and was a little dirty. Now, the proof does not show that there was a greater number of pounds of inferior cotton placed in the bales than six hundred. Guilty knowledge is inferred from the fact that appellant stated that the inferior cotton was placed in but two bales. In this appellant was mistaken, and, under the evidence in this record bearing upon the method of ginning and packing cotton, this mistake was quite natural. We are of the opinion that guilty knowledge is not shown.

Again, appellant is charged with selling, bartering and giving in payment four bales of cotton falsely packed with *inferior cotton* to that with which the bales were apparently filled. The indictment is evidently drawn under article 470, Penal Code. This article prohibits the placing or the putting into any hogshead, cask, bale, etc., "containing merchandise or other commodity usually sold by weight, *any article whatever* of *less value* than the merchandise with which such bale, etc.,

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is apparently filled." It also prohibits the sale with intent to defraud of any such bale, etc.

Standing alone, we might construe this article so as to embrace merchandise or commodities of inferior grade or quality to that with which the bale was apparently filled. But, when construed in connection with article 471, merchandise or commodities of inferior grade or quality are clearly not embraced within the provisions of article 470. "Inferior quality" evidently means that the merchanise or commodity is the same as that with which the bale is apparently filled, but inferior in quality. This is rendered certain by the fact that the punishment is different.

To illustrate. A conceals damaged cotton in a bale which is apparently filled with good cotton. This is prohibited by article 471, but not by article 470. This being so, there is no law punishing the sale of a bale of cotton so packed, though the seller knew the condition of the bale when he sold, and intended to defraud.

If one, with intent to defraud, conceals an inferior quality of cotton, that is, cotton inferior in quality to that with which the bale is apparently filled, he should be indicted under article 471.

Because there is no law punishing the sale of a bale of cotton packed with an inferior quality of cotton, the judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

Opinion delivered May 8, 1889.

No. 2709.

M. G. KNOWLES v. THE STATE.

1. THEFT—PRINCIPAL OFFENDER—FACT CASE.—The indictment in this case charged the appellant as a principal in the theft of a mare, but the evidence wholly fails to connect him in any manner with the original taking of the said mare. *Held*, that such proof is insufficient to support a conviction for theft.
2. SAME—CHARGE OF THE COURT—The charge of the court defining principals was abstractly correct, but it failed to apply the law to the facts

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developed on the trial. To supply this omission the defendant requested the court to instruct the jury that, "in order to convict the defendant, they must find from the evidence that the defendant was, as a principal, as hereinbefore defined, concerned in the original taking of the mare; and if they find from the evidence that one Jeff Griffin first took possession of the mare alleged to be stolen, and delivered the same or sold the same, for himself or for one J. J. Elkins, to defendant, then they should acquit the defendant although they should believe that the original taking of said animal by Griffin was fraudulent and that defendant knew it was fraudulent." *Held*, that the refusal to give such instruction, under the proof in this case, was error.

8. SAME—In its motion for rehearing, the State contends that the complicity of the defendant in the offense charged is shown by the testimony of the witness W., to the effect that defendant told him that "all the connection Griffin had with the mare was this: that he, defendant, sent said Griffin to get the mare for him and to bring her to him"—the effect of which would be to constitute G., an innocent agent acting by command of the defendant, and the defendant by reason thereof (all other elements of theft existing) the sole principal offender. *Held*, that if said testimony of W. imports such a case, then the charge of the court was fatally erroneous in not submitting that phase to the jury; wherefore rehearing is refused.

APPEAL from the District Court of Gonzales. Tried below before the Hon. George McCormick.

The conviction in this case was for the theft of a mare, the property of some person to the grand jurors unknown, in Gonzales county, Texas, on the twenty-third day of April, 1887. A term of five years in the penitentiary was the penalty assessed against the appellant.

M. C. West was the first witness for the State. He testified that he was a member of the grand jury that found this indictment. Witness went to his home during the time court was in session, and while there the theft of the "*RD*" mare was under investigation. Defendant came to witness's house and told him that he bought the said mare from one John Smalley, and that "all the connection Jeff Griffin had with the mare was this, that he, Knowles, sent said Jeff Griffin to get the mare for him, Knowles, and to bring the mare to him, Knowles." The grand jury inquired of a large number of witnesses about the ownership of the mare, but no one of them knew.

Zack Davis testified, for the State, that he knew the alleged stolen mare. That animal ran with witness's father's horses on the range in Gonzales county, near the Wilson county line,

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Statement of the case.

for six or seven years. Witness last saw that mare late in April, 1887, in Gonzales county. She was then in the possession of Jeff Griffin, being one of the drove of witness's father's horses which Griffin was then driving towards the Wilson county line. Witness saw the said drove of horses soon afterwards, but the said mare was not then among them. The witness never knew an owner for said mare, and so testified before the grand jury. He never saw her nearer the Wilson county line than a quarter of a mile.

Deputy hide and cattle inspector Dickey, of Wilson county, testified that late in April or early in May, 1887, he inspected a bunch of horses for the defendant, who exhibited bills of sale for all of them except two mares, one being the animal involved in the prosecution. With reference to his possession of the two animals without bill of sale, the defendant explained that he came by the house of Joe Blain, from whom he purchased one, --and the witness understood him to indicate the one described in the indictment—to get the bills of sale, but that Blain was not at home. He claimed to have bought the other horse from J. J. Elkins. On that explanation witness passed the two said mares.

Sheriff W. E. Jones, of Gonzales county, testified, for the State, that, subsequent to his indictment at the July term, 1887, the defendant came to him several times and appealed to him to see the district attorney in his behalf about this case, and get the said district attorney to accept him as State's evidence. He proposed that, if he would be accepted as State's evidence, he would testify fully about this theft, and against Barber and Blain, against whom other indictments were pending. In the same conversations defendant claimed that he bought the *RD* mare from Jeff Griffin, who was also under indictment.

Dick Glover, deputy sheriff of Gonzales county, testified, for the State, that, in the summer of 1887, the defendant told him that he bought the *RD* mare from John Smalley, and showed him a bill of sale, conveying the said mare, signed "John Smalley." Witness knew the mare well, but never knew to whom she belonged. She always ranged in Gonzales county.

The State next introduced in evidence the recognizance entered into by the defendant to appear at the July term, 1887, of the district court, and answer to this indictment, the judgment nisi entered thereon, and the judgment final on the forfeiture of the recognizance.

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Statement of the case.

Deputy Sheriff Chenault testified that defendant made default at the July term, 1887, and was arrested in September, 1887.

The State closed.

Martin Mahula was the first witness for the defense. He testified that he lived in Bexar county, near St. Hedwig. While traveling the road, in Bexar county, in the summer of 1886, the witness met a man who gave his name as James Elkins. Elkins told witness that there was an *RD* mare in Gonzales county for which he wanted to trade with witness, the said brand of stock belonging to witness. He then proposed to trade witness a mare in the "heart" brand, which ran on the range near the witness's place in Bexar. The trade was made but no bills of sale were passed at that time. In September, 1887, witness received a letter from Elkins asking for a bill of sale to the *RD* mare. Witness sent him the bill of sale, demanding one in return for the "heart" mare, which Elkins sent him. Witness bought the *RD* brand of stock from one Finley in 1885. That brand originally belonged to W. R. Davenport.

On his cross examination, this witness said that he had never seen James Elkins prior to meeting him on the public road in 1886. He did not know of the *RD* mare running in Gonzales county until he traded with Elkins, and only claimed her then by the brand.

J. J. Elkins testified, for the defense, substantially as did Mahula about the trade between him and Mahula. He stated further that, in April, 1887, he sold the *RD* mare to the defendant. Afterwards, when the defendant was taking the said mare and other horses to the San Antonio market, witness met him at the Sour Springs, in Wilson county, and had a talk with him about the said mare.

On his cross examination, the witness said that he was before the grand jury about this case, but had no recollection of being interrogated about the ownership of the *RD* mare. He did not execute a bill of sale to Mahula until September, 1887, after the indictment was found and the defendant had forfeited his recognizance. It was after that time that he told Paul Murray that he, witness, had traded one of his, Murray's, mares to Mahula. Mahula and witness exchanged bills of sale by letter in September, 1887. Witness several times saw Paul Murray between the time of the trade with Mahula and the indictment of the defendant, but never mentioned the trade to him. In

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Opinion of the court.

the spring of 1887 Jeff Griffin came to where witness and John Markham were at work, and told witness that he was getting up stock for the defendant, and witness told him to take up any of his stock he could find "on the outside."

James York testified that he knew the *RD* mare on the range, and understood that she belonged to W. R. Davenport. He never heard any person claim her, but heard that Davenport owned the *RD* brand. Witness was before the grand jury in this case and was interrogated about the ownership of the said mare.

Paul Murray testified, for the defense, that he had known the alleged stolen mare seven or eight years, during which time it was his understanding that she belonged to W. R. Davenport. On cross examination the witness said that after the defendant had forfeited his recognizance in this case, J. J. Elkins came to him, witness, and offered to pay him twenty-five dollars for a mare belonging to him, witness, which he, the said Elkins, told witness he had traded off. Witness declined to accept the twenty-five dollars, as it was his understanding that the said mare had a yearling colt when traded off by Elkins. Mr. Elkins finally paid witness forty dollars for the mare and colt. The defense closed.

Two or three members of the grand jury testified that Elkins was interrogated before the grand jury about the ownership of the alleged stolen animal, and he swore that he did not know who owned her.

W. S. Fly and *W. W. Glass*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction was for the theft of a mare. Though we have carefully considered all the assignments of error, we will discuss only such as we think are of importance.

The charge of the court with regard to the venue was correct. The mare was taken in Gonzales county. This was clearly shown, and if appellant was a principal in the taking, the venue would be in Gonzales county whether appellant was the actual taker or not. The contest, therefore, is back of this. It is whether the proof shows that appellant was a principal. Did he actually take the mare, or was she taken by some other person under such a state of facts as constituted him a prin-

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cipal? If not, he should not be prosecuted in any county for the *theft* of the mare, because not guilty of *theft*.

It is very clearly shown by the statement of facts that Jeff Griffin took the mare, and that appellant was not present when she was taken. Griffin is also indicted for the same theft. Elkins not only swears positively that he sold the mare to appellant, but that "Jeff Griffin told him that he was getting up stock for defendant, and he (Elkins) gave him authority to get any of his stock that he found on the outside." These are the facts bearing on the issue of principal *vel non*.

There is no proof that appellant and Griffin or any other person had conspired to steal the mare. It is not shown that appellant advised or commanded Griffin to steal the mare, and, if there was such proof, then there is no proof that the appellant, at the time the mare was taken, though not present, was doing any act whatever in furtherance of the common purpose. It is not even shown that appellant knew that Griffin was going to get up the mare and bring her to him. The proof fails to show that he knew that Griffin had taken the mare until she was delivered to him by Griffin in pursuance to instructions given him by Elkins. With such a dearth of testimony bearing upon this issue, principal *vel non*, we can not sanction this conviction.

While the charge of the court announced the correct principles relating to principals and accomplices, there was no direct application of these principles to the case in hand. Counsel for appellant in their charge number one sought to make the application, but the court refused the charge. Under the circumstances of this case, we think this was error.

The judgment is reversed and cause remanded.

Reversed and remanded.

Opinion delivered at Galveston March 23, 1889.

[Subsequent to the rendition of this opinion, the Assistant Attorney General filed a motion for rehearing, which was taken under advisement and transferred to the Austin branch of this court, where, on the fourth day of May, 1889, the said motion was disposed of by the opinion which follows. The case is now reported as of the Austin term, but, as the record belongs to the Galveston branch, under the Galveston file number.]

HURT, JUDGE. At Galveston we reversed the judgment in this case with a written opinion by the present writer. In that

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opinion it was stated that there was no proof that this appellant advised or commanded Griffin to steal the mare, or that this appellant knew that Griffin was going to get up the mare and bring her to him, etc.

It is contended by the State that there is such proof, and we are referred to the testimony of M. C. West, who testified that appellant stated to him "that all the connection Griffin had with the mare was this,—that he, Knowles, had sent said Griffin to get the mare for him, and bring her to him."

The writer understood that this statement was introduced in evidence to prove that he, appellant, was endeavoring to shield Griffin, who was under indictment for the theft of the mare, and not as a confession of facts from which Griffin's innocence might be inferred. But conceding that this view was not correct, then another phase of the case is presented; that is that the mare was taken by an innocent agent instigated thereto by appellant.

The charge of the court—that part relating to the question of principals—is evidently based upon the theory that all the parties to the transaction were guilty participants. The theory that Griffin was the innocent taker at the instance of the appellant, thus making appellant a principal, is not hinted at in any part of the charge; and it is upon this theory that the Assistant Attorney General in this motion contends that appellant is shown to be a principal. The facts failing to show appellant a principal upon the hypothesis that Griffin was a guilty taker, yet, all the elements of theft attending, if Griffin took the mare innocently and was requested to take her by appellant, he, appellant would be the principal and this conviction as principal would be correct. But this view of the case was not presented to the jury in any part of the charge. The jury were not called upon to determine whether or not Griffin was innocent in taking the mare. They reached the conclusion that appellant was a principal from the charge of the court based upon the theory that Griffin was a guilty participant, and not upon the ground that he was an innocent agent. As the appellant stands convicted of theft as a principal, to sustain the conviction the proof must show him to be a principal, and the jury must be correctly instructed what in law constitutes a principal, in all cases in which it is left in doubt as to whether he is a principal or an accomplice. The court properly instructed the jury as to what constitutes a principal upon the hypothesis

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that Griffin was guilty in the taking of the mare, but failed to instruct upon the theory that he was an innocent agent. This omission in the charge was error of such serious character as to require a reversal of the judgment, and hence the motion for rehearing is overruled.

Motion overruled.

Opinion delivered May 4, 1889.

No. 6357.

CARL HENKEL *v.* THE STATE.

1. PRACTICE—FORMER ACQUITTAL OR CONVICTION.—The Code of Procedure, article 553, provides that a former acquittal or conviction in a court of competent jurisdiction bars a further prosecution for the same offense, "but shall not bar a prosecution for any higher grade of offense, over which the said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense." This was a prosecution by information in the county court for aggravated assault. The appellant pleaded in bar his former conviction in the justice's court, which appears to have been a prosecution and conviction under a complaint, and not by information, for simple assault. *Held*, that the plea was properly stricken out.
2. AGGRAVATED ASSAULT—EVIDENCE.—The aggravation alleged in the information was that the accused is an adult male and the injured party a female, and such allegation imposed upon the State the onus of proving that the accused was an *adult* male—a male person who had attained the full age of twenty-one years. But in a case of this character the proof need not show *in ipsissimis verbis* that the defendant was an adult. *Sufficient* that he is proved to have been a "man" and a "railroad hand," and that it was not controverted that he was an adult.
3. SAME.—CHARGE OF THE COURT instructed the jury as follows: "The intended injury may be bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind. The handling of a woman without her consent, in order to have undue familiarities with her may produce such emotions without inflicting bodily pain or injury." *Held*, correct.

APPEAL from the County Court of Caldwell. Tried below before the Hon. Leo Rogan, County Judge.

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Opinion of the court.

The conviction in this case was for an aggravated assault upon one Johanna Earnst, a married woman. The penalty assessed against the appellant was a fine of five hundred dollars and confinement in the county jail for one year.

The proof shows that at the time of the assault, the defendant was the guest of J. H. Earnst. On the night of the assault the defendant and Earnst, occupying separate pallets, slept on the gallery and Mrs. Earnst in the house. About midnight, while Ernest was asleep, defendant went into Mrs. Earnst's room, where she was sleeping on the bed, placed his hand on her shoulder, his cheek to her face, and called her "Mama," the endearing name by which she was familiarly addressed by her husband. Mrs. Earnst straightened up in bed and exclaimed, "What do you want?" when defendant rapidly retired. When charged, on the same night, with having invaded the privacy of Mrs. Earnst's room, the defendant did not deny it.

J. F. Cahill, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant was tried on a complaint in a justice's court charging him with an assault upon the same party and on the same occasion as is charged in the information in this case. On that trial he pleaded guilty to an assault and was fined by the justice in the sum of five dollars. He pleaded this former conviction in bar to the prosecution in this case. His plea was stricken out on motion of the prosecuting attorney, and this action of the court is one of the errors complained of. Evidently the defendant was tried and convicted in the justice's court and punished for a simple assault. His trial was not for an aggravated assault, and moreover, it was had upon a complaint and not upon an information or indictment. His prosecution herein was by information and for an aggravated assault, the charge in the information being an assault by an adult male upon a female. Such being the character of the two prosecutions, the former conviction was not a bar to the latter prosecution, which was for a higher grade of offense, and because the former conviction was not the result of a prosecution by indictment or information. (Code Crim. Proc., art. 553; Allen v. The State, 7 Texas Ct. App., 298; Achterberg v.

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The State, 8 Texas Ct. App., 463; Grisham v. The State, 19 Texas Ct. App., 504; White v. The State, 9 Texas Ct. App., 390.) There was no error in striking out said plea.

As stated above, the information in this case charged an aggravated assault by an adult male upon a female, and in order to warrant a conviction the prosecution was bound to prove the allegation as laid,—that is, that the defendant was an *adult* male. "Adult" means a person who has attained the full age of twenty-one years." (George v. The State, 11 Texas Ct. App., 95; Schenault v. The State, 10 Texas Ct. App., 410.) There is no direct positive proof in the statement of facts to the effect that defendant was and is an *adult* male, but we find that he is spoken of as a "man" and "a railroad hand," and there was no question made at the trial below as to this fact. On the contrary, the defendant appears to have been recognized by all the parties at the trial, and by the court, as an adult. The rule seems to be now well settled upon this subject that, where there is no question or controversy as to this matter raised or availed of in the court below nor suggested by the facts in evidence, the case will not be reversed for want of specific proof of the fact. (Tracy v. The State, 44 Texas, 9; Veal v. The State, 8 Texas Ct. App., 477; Gaston v. The State, 11 Texas Ct. App., 143; Andrews v. The State, 13 Texas Ct. App., 343; Hall v. The State, 16 Texas Ct. App., 6.)

That paragraph of the charge of the court to which defendant specially excepted is fully sustained by repeated decisions of the courts of this State. (Pfefferling v. The State, 40 Texas, 486; Thompson v. State, 43 Texas, 583; Curry v. The State, 4 Texas Ct. App., 574; Ridout v. The State, 6 Texas Ct. App., 249; Atkins v. The State, 11 Texas Ct. App., 8; George v. The State, Id., 95; Sanford v. The State, 12 Texas Ct. App., 196; Willson's Crim. Stats., sec. 841.)

We have found no material error in the record as submitted to us in this case, and the judgment is therefore affirmed.

Affirmed.

Opinion delivered May 4, 1889.

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Syllabus.

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No. 6299.

J. M. BRACKENRIDGE v. THE STATE.

1. EXTORTION—TERM DEFINED—INDICTMENT.—In legal parlance, and as used in article 240 of the Penal Code, defining extortion, the word "demand" means "a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting." One of the duties of a county judge is to present to the county commissioners his certified account for the fees allowed him by law in criminal cases, and the presentation of such an account by a county judge to the county commissioners, with the request that they approve the said account as a claim against the county, constitutes a "demand" within the meaning of the law. Among the fees which the county judge is entitled to demand and receive from the county is the sum of three dollars for each criminal action "*tried* and finally disposed of" before him. A criminal action *dismissed* is not a criminal action "*tried* and finally disposed of," and if the certified account presented by a county judge to the county commissioners includes a fee for a criminal action merely dismissed, the presentation of such an account amounts to a "demand" for fees not allowed by law. See the opinion *in extenso* for indictment *held* sufficient to charge the offense of extortion as defined by article 240 of the Penal Code.

2. SAME.—EVIDENCE.—Over the objections of the defendant, the State was permitted to introduce in evidence a prior indictment against the defendant for demanding, as county judge, fees not allowed by law. *Held*, that the evidence was properly admitted as tending to show a knowledge on the part of the defendant that the fees demanded by him were not lawful,—to which purpose the said evidence was expressly limited by the charge.

3. SAME.—REMOVAL FROM OFFICE FOR OFFICIAL MISCONDUCT.—Article 3888 of the Revised Statutes provides that "all convictions by a petit jury of any county officers for any felony, or for any misdemeanor involving official misconduct, shall work an immediate removal from office of the officer so convicted, and such judgment of conviction shall in every instance embody within it an order removing such officer." Demanding fees not allowed by law is "official misconduct" within the purview of the statutes of the State

4. SAME.—Article 3415 of the Revised Statutes provides that "no officer shall be prosecuted or removed from office for any act he may have committed prior to his election to office." The proof shows that the defendant was elected and qualified as county judge of Travis county in 1886. That he was re-elected on the sixth day of November, 1888; that the offense was committed on the fifteenth day of November, 1888, and that he did not qualify under his re-election until the twenty-first

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day of November, 1888. It is contended that, under this proof, the defendant is protected from removal by the said section 3415, because he had not *qualified* as his own successor as county judge at the time of the alleged offense. But *held* that the position is not maintainable; the defendant, at the time of the offense, was county judge *de facto* and *de jure*, and by virtue of his election and qualification in 1886 was exercising the functions of his office, and had the legal right to exercise them until his successor should qualify; wherefore his official acts on the fifteenth day of November, 1888, came within the purview of article 3388 of the Revised Statutes, and not of article 3415. See the opinion in extenso on the question.

6. PRACTICE.—DISQUALIFICATION OF A JUROR.—NEW TRIAL.—The defendant's motion for new trial sets up that, though on his *voir dire* the juror Doss declared his competency to sit as a juror, he was, in fact, as ascertained by the defendant after the trial, an incompetent juror, being neither a resident of Travis county, a house holder in said county, nor a freeholder in the State, and that before the trial he declared his prejudice against the defendant. The district attorney filed a written denial of the allegations made in the motion for new trial, but introduced no evidence in support of said denial. In this state of the case, the juror Doss must be held to have been incompetent, and his service upon the jury entitled the defendant to a new trial.

APPEAL from the District Court of Travis. Tried below below before the Hon. W. M. Key.

The conviction in this case was had under an indictment which charged the appellant, as county judge, with official extortion in demanding fees not allowed by law. The jury assessed as penalty against the defendant a fine of twenty-five dollars, and, upon the verdict, the trial judge adjudged his removal from office, and declared the office of county judge vacant.

The State introduced in evidence the account upon which the indictment was based as follows:

"Statement of total cases deposed of by Hon. J. M. Brackenridge from last statement, October 6, 1888, to date, November 15, 1888:

Criminal cases:

3463	3051	3325	3334	3336.....	5
3342	3354	3356	3359	3360.....	5
3361	3362	3372	3377	3383.....	5
3524	3500	3949	3507	3506.....	5
3525½	3605	3606	3609	3610.....	5

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Statement of the case.

3611	3612	3613	*3502*	*3521*	5
3617	3729	3526	3529	3530	5
3531	3532	3533	3544	3545	5
3547	3548	3549	3551	3564	5
3565	3566	3567	3568	3569	5
3570	3571	3572	3591	3595	5
3603	3619	3496	3504	3543	5
3618	....	....	....	....	1

Lunacy cases:

1366	1367	1368	1369	1370	5
1371	1373	*1374*	....	.....	3
					69
Less 7 cases				62 cases	7
					62

I hereby certify that the above account is just and due for cases tried and disposed of in the Co. court of Travis Co., Sate of Texas. To J. M. Brackenridge, Co. Judge, at $3.\frac{00}{100}$ per case. 189.00

207.00

"J. M. BRACKENRIDGE,
"Co. Judge."

Endorsed "Reg. No. 19,695, Dec. 10, 1888.

Approved—*William Wellmer, Co. Com'r. Prec. No. 1.*
A. G. Kemp, " " " " 2
S. C. Granberry " " " " 3
J. W. Cloud, " " " " *4*
J. W. Cloud, C. C. P. No. 4.
William Wellmer, C. C. 1."

The said account is endorsed across the face: "J. M. Brackenridge."

Ed Anderson testified, for the State, that he was the county treasurer of Travis county, and as such was the custodian of the account exhibited in evidence, which was placed in his hands by A. R. Morris, tax collector of Travis county.

[NOTE.—The words and figures in italics denote words and figures which were cross-lined out in the account as approved and put in evidence.—REP.]

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On his cross examination, this witness stated that he held the account, which bore the approval of the county commissioners, as a liquidated claim against the county, and presumed that the same was paid by Collector Morris. The witness could not designate the law under which he became the custodian of the account. He did not pay the said account on a warrant issued by the county clerk. He thought the endorsement of the commissioners court was authority sufficient for the payment of the claim, and did not know that he had no authority to pay it except upon warrant drawn by the county clerk.

J. W. Cloud testified, for the State, that he was county commissioner of precinct number four of Travis county, and held that office in November, 1888. He identified the account in evidence as the account which the defendant presented to the commissioners court for approval at its regular meeting in November, 1888. Defendant was then county judge of Travis county. Defendant wrote the certificate to the said account in the presence of the said court, remarking that he "would write the certificate to this account, and give the court a good one; that Jeff Brown wrote the certificate on the previous accounts, but he would write this one." The said account at that time contained no erasures. The commissioners court at that time had a stamp with the names of the commissioners on it which was used in approving claims against the county. That stamp of approval was placed upon this account without the knowledge or consent of the witness. Witness did not know who impressed it upon the said account. The witness soon ascertained that the said account was stamped "approved," and that it included fees for several cases that had not been tried. Witness and Commissioner Wellmer then procured the account from Captain A. J. Jernigan, then county treasurer, and withdrew or erased their names or stamped signatures therefrom. Defendant became indignant and angry with witness and Wellmer for doing so, and said that he would "make it warm for somebody." He became angry with witness and Wellmer because they would not approve his claim; charged that witness and Wellmer had "gone back" on him, and would not allow him his fees, although he needed money. The witness told defendant that if he would present his account, omitting the dismissed cases, it would be approved. Jeff Brown afterward presented the account, in its present shape, with the dismissed cases erased, and it was approved. The witness, on the day

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Statement of the case.

prior to this trial, heard the defendant tell James H. Robertson that he instructed Jeff Brown to make out his account and to include the dismissed cases.

On his cross examination, the witness said that he did not critically examine the account nor compare it with the docket, when it was first presented by the defendant. The defendant at all times of which witness had any knowledge openly asserted his right to fees in cases dismissed, and contended, when complaining of witness and Wellmer, that he was as much entitled to fees in those as in any other State cases. The witness did not know when nor by whom the erasures in the body of the account, nor the interlineations, in the certificate, were made. They were in the account when finally approved.

Frank Brown testified, for the State, that he was the clerk of the county court of Travis county. The defendant was county judge of Travis county in November, 1888. He was first elected and qualified in 1886. He was re-elected at the general election on November 6, 1888, and qualified under his re election on November 21, 1888. The minutes of the county court being produced, the witness's attention was directed to criminal cases Nos. 3383, The State v. Roy, gaming; 3499, The State v. Smith, aggravated assault; 3500, The State v. Brown, aggravated assault; 3502, The State v. Silver, misdemeanor theft; 3507, ex parte Williams, application for writ of habeas corpus, and 3521, The State v. Kitchens, aggravated assault, all of which cases, he testified, were shown by the minutes to have been "dismissed" without trial. Witness was not personally present when the said cases were dismissed, and could not say upon what ground they were severally dismissed. The minutes disclose no more than that they were dismissed.

The State next introduced in evidence the file papers in each of said cases, comprising the indictments, capiases with returns showing arrests, appearance bonds, subpœnas, etc. It next introduced in evidence an indictment against the defendant filed previous to the filing of the indictment in this case, charging him with a similar offense.

District Clerk James P. Hart testified, for the State, that the file number of the indictment introduced in evidence was 8484. Defendant entered into recognizance on that cause on October 19, 1888. Witness did not think that the defendant ever read the indictment in that cause. Major Walton and Mr. Wheless, who were employed by defendant as counsel,

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saw and read the said indictment, and Mr. Wheless made a copy of the account embraced in it.

The State closed its case by introducing in evidence the defendant's application for a postponement in cause No. 8484, when it was called for trial on October 30, 1888. Stated in brief, that application shows that the defendant expected to prove by the absent witness, H. B. Barnhart, then county attorney of Travis county, that "defendant advised with him as the county attorney and legal adviser of the county of Travis, in reference to his right to demand and receive a fee of three dollars in each and every criminal action dismissed by the defendant from the criminal docket of the county court of Travis county, and requested said Barnhart to investigate the matter thoroughly and advise him as to his right to collect the same; that Barnhart did examine the said question, and did advise defendant that he should, and lawfully could, demand and receive three dollars in each and every criminal action dismissed by him from the criminal docket;" that defendant "applied to the Hon. J. S. Hogg, Attorney General of the State of Texas, now temporarily absent from Travis county, for his opinion as to whether the county judge was entitled to charge fees in dismissed cases that were finally nolle prosequied; that the said Attorney General did not give his opinion, but said that he thought there was some data in his office upon that identical question, in the shape of a letter or written opinion; that search failed to discover the said letter or opinion in the said Attorney General's office, and the said Attorney General declined to give a decisive opinion on the question.

H. B. Barnhart testified, for the defense, that he was county attorney of Travis county in October, 1888. Prior to that month the defendant came to witness and asked him if he was entitled to charge fees for cases dismissed by him from the criminal docket. The witness replied that he was unable to say at that time, and promised to examine into the question and advise him. Defendant asked him about the matter two or three times afterward, and witness each time told him that he had not investigated the matter. On the last occasion defendant remarked that the statute allowed him three dollars for each case finally disposed of, and asked witness if a case "dismissed" was a case "finally disposed of," and witness replied: "Yes, in my judgment it is, and in such case you are entitled to charge your statutory fee."

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Argument for the appellant.

Ex-County Treasurer A. J. Jernigan, ex-County Attorney E. T. Moore, ex-County Attorney H. B. Barnhart, District Clerk Hart, County Clerk Brown, County Tax Collector Morris, County Treasurer Anderson, County Commissioner Cloud and Deputy Sheriff Johnson, each testified, for the defense, that they had known the defendant for several years, and that his reputation for honesty in the community of his residence was good.

F. G. Morris, attorney at law, testified, for the defense, that he had known the defendant a number of years, and that, leaving out of consideration this and other similar indictments recently preferred against him, the reputation of the defendant for honesty and integrity was good.

A. M. Jackson, Jr., attorney at law, testified, for the defense, that, except as to the matters involved in this and another indictment for a similar offense, he had never heard the defendant's character for honesty and integrity discussed.

The defense closed.

Attorney General Hogg testified, for the State, that he had met the defendant a few times and knew him, but had no recollection of the defendant ever applying to him for advice as to his right to collect fees for criminal cases dismissed by him as county judge, but the defendant may have done so. Witness never gave opinions except in writing, when he could avoid it.

On cross examination, the Attorney General testified that the subject matter of judges charging fees for dismissed cases had been discussed in his office, but he had no recollection of ever having given an opinion on the matter.

Walton, Hill & Walton, T. H. Wheless and *A. T. Patrick*, for the appellant. Defendant excepted to the indictment for insufficiency.

1. It charges no criminal offense against the laws of Texas.
2. The facts alleged do not show a demand for fees not allowed by law.
3. It only charges an application by defendant as a man for the approval of the account indicted.
4. It fails to charge that the act indicted was done by defendant in his official capacity.
5. It charges in whole and in part acts outside the performance of official duty.

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Argument for the appellant.

Was there a demand for fees in the facts stated in the indictment? The act was a demand for the approval of an account which contained items of fees. Was that an unlawful demand for fees not allowed by law? The Statute provides (art. 1075, Code Crim. Proc.) that the county judge shall be allowed a fee of three dollars for every criminal case finally tried and disposed of by him. Article 1076, Id., provides that the judge shall make out his account for fees, certify to its correctness and file it with the clerk of the court. *Then* the commissoners court shall *approve* such account for such amount as they *may find correct, when* they shall order a draft to be issued upon the county treasurer in favor of the judge for the *amount* of the account *so approved.*

The action of the appellant was, under the statute, nothing more than to invoke the judicial power of the commissioners court to investigate the fact as to whether the account certified by him was correct, and to make a judicial finding as to the amount that was correct. The certificate of the judge as to the correctness of the account could, under no circumstances, authenticate it for payment; it only prepared the account for the investigation the court was to make—until certified, the court could not investigate. It was as necessary for him to certify the account, to move the court to investigate its correctness, as it was that an indictment should have been returned before the trial of this case or that a pleading should be drawn and filed before any relief could be granted in a court of record. It was a necessary preliminary to the making of a demand for fees. He could never obtain the money on said account, no matter whether approved or not. No custodian of public money would or could legally pay the account. The account had to be approved by the court, and a draft for the money ordered and the draft drawn, before payment could be made or legally demanded. How, then, could a demand for fees be made by the presentation of an account for approval that is not recognized by law as a paper that can be paid? He was a suitor before the court for relief, viz.: to have this account corrected—for its approval as corrected—to be made the basis of a draft, which he might present to the treasurer, and on it demand his fees. Until these proceedings were had he could make no demand for fees, if fees mean money. Article 998, Revised Statutes, provides that the county treasurer shall not pay any money out of the county treasury except in pursuance of a certificate

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or warrant from some officer authorized by law to issue the same. The certificate mentioned in the law does not include certificate of the county judge touching his fees, for the simple and sufficient reason that the law makes special and particular provision in regard to that matter.

Demand means "the asking or seeking for what is due, or claimed as due; a thing or amount claimed to be due." (Webster's Un. Dict., sub. 5 of last title of "Demand.") The same meaning is given substantially in the law dictionaries. We find no adjudicated case to cite on this point, but we hardly deem it necessary, the principle governing the question vindicating itself. Suppose on the non-payment of fees, when demanded, the account therefor would bear interest, could it be said that the presentation of an account for adjustment or adjudication as to correctness—would a refusal of the court to approve it put the interest clause in motion? And so, if demand for fees were necessary before suit against the county could be legally brought, would the refusal to approve by the court authorize suit? We certainly do not think so. In such cases there would be two chapters in the transaction. First, the court would by mandamus be compelled to approve the account, order warrant, warrant issue; and second, then demand be made for payment of the fees by the treasurer. If he refused to pay, then in the one case interest would run, and in the other suit could be brought; but no interest would run and no suit could be maintained on the mere refusal of the court to approve the account; and so we confidently claim that no such demand as contemplated by the statute was made in this case as will uphold the indictment or conviction.

The indictment charges extortion merely—does not charge official misconduct, except inferentially—and fails to charge the act was done officially. It says he was an officer, and did so and so, but not that he did so and so as an officer. He might have been a murderer and an officer, or any other character of an offender and an officer at the same time; but to be guilty of official misconduct the offense must be done officially, and the indictment must so charge. (Smith v. Ling, 9 Pacific Rep., 171.)

2. If, however, the court should consider the indictment sufficient, then, can the conviction stand for official misconduct, and consequent removal from office.

The statute is that any conviction involving official misconduct shall work an immediate removal from office of the officer

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so convicted. (Rev. Stats., art. 3388.) Article 3393, Id., defines official misconduct thus: "Any unlawful behavior in relation to the duties of his office, wilful in its character, of any officer intrusted in any manner with the administration of justice or the execution of the laws; * * * any wilful or corrupt failure, refusal or neglect of an officer to perform any duty enjoined on him by law." Other than as above there is no official misconduct known to the laws of Texas. Does the act charged come within the definition? The act must be unlawful behavior in relation to the duties of his office, or failure, neglect or refusal to perform some duty enjoined on him by law. The act must be official in character and performed as an officer in the exercise of the duties of his office. Nothing short of that will bring him under the denunciation of the law. This act must be extortion in office. The office—the powers of the office must have been put in motion—must have been demanded under the color of his office, as was expressly said in Collier v. The State, 55 Alabama, 125; Cleveland v. The State, 34 Id., 259; 18 Massachusetts, Dunlap v. Curtis, 210.

The motive and intent must be corrupt. No claim of right must exist. Vide American Criminal Law (Desty), section 84*a*, with authorities cited; also Cutter v. The State, 36 New Jersey, 125. It was shown by the testimony that appellant openly claimed the right to charge and collect these fees. He repeatedly asked the county attorney to investigate the matter. He went to the Attorney General with the question, but did not see him. (Vide the affidavit of appellant for a postponement of the case, put in evidence by the State.)

In this case there was a claim of right. Wilfulness is absent. Corrupt motive and intent wanting. The act was not done in the exercise of the duties of his office. The power of the office was not brought to bear.

It may, and probably will, be said that the making of the certificate was an official act. Admit it, but the indictment is not for that; it is for demanding fees not allowed by law. The making of the certificate was not a demand for fees; whatever else may be called a demand, that is not.

The law does not contemplate that the judge shall present the account for approval, officially or otherwise. (Vide art. 1076, Crim. Proc.) It provides he shall certify it and file it with the clerk. After that, the court shall act. If to present the account for approval is the exercise of the duties of his office, or

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a duty enjoined on him by law, then to fail to discharge that duty or to exercise it, would be malfeasance, and he would be subject to indictment and removal from office. To state such a proposition is to refute it. To reason over this case, so bare is it of merit, that it is like trying to explain why two and two make four.

Nevertheless, the conviction was construed by the court to include official misconduct; in fact, that the act charged was official misconduct, and the judgment was so entered, and that the judge be removed from office.

3. If wrong in the foregoing, then is the verdict sufficient to authorize the judgment? Article 73 of the Penal Code provides that "whenever an offense is committed by an officer, and the same appears to the jury to be a willful violation of duty, they shall so find, and such officer shall be removed from office."

It is not enough that the jury shall find a verdict simply of guilty, but it shall be an express and direct finding that the act charged was a willful violation of duty. It would not only be proper, but we think necessary, that the court should instruct the jury to so find under given facts. The jury should know and realize the full force and effect of the verdict they return. While the indictment charges that the act was wilful and the jury finds "guilty," yet that is far short of a finding in express words that the act was a wilful violation of duty. The court can hardly fail to see the vitality and importance of the distinction made. The defendant should be heard on every phase of the case, and the jury be advised by him on every form of verdict they can return. The act here charged was extortion, pure and simple, and no charge of violation of official duty. It can not be said that the finding on the charges is tantamount to a finding in the language of the article cited.

4. The fourth question is an interesting one, and is this:

Can an officer, who is his own successor, be removed from his new term for acts done between the date of his re election and his qualification for the new term?

In this case appellant was re-elected, on the sixth of November, his own successor. The indictment charges the act to have been done on the eighth of November. The facts show that it was done on the fifteenth of November, and the evidence is that he qualified for his new term on the twenty-first of November. On the fifteenth of November was he the old judge

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or the new? He was tried after his qualification for the succession and removed from office—that is, he was removed from the new office.

Article 3415, Revised Statutes, provides that no officer shall be removed from office for acts done prior to his election to office. In Gordon v. The State, 43 Texas, 330, it was decided that, to authorize the removal of an officer, the charge must specify some act or omission since his election showing his unfitness for the office. In Trigg v. The State, 49 Texas, 645, the court say: "The petition embraces a period between the election and his induction in office, which doubtless the court would have had corrected if attention had been called to it by special exception;" which, interpreted by the Reporter, means: "Acts of drunkenness, between the election and qualification of an officer, should not have been allowed in the pleading or in evidence." We doubt not that the interpretation is correct, or else the language of the court is meaningless nonsense. In Ling v. The State, before cited, it is said that after a person ceases to be a public officer he can not be prosecuted for official misconduct. And to the same effect is Stubbs v. The State, 53 Mississippi, 437. In Flatan v. The State, 56 Texas, 101, Mr. Justice Stayton said, referring to section 24, article 5, Constitution, on the subject of removals from office by the district judges: "The whole context of the section of the Constitution bears unmistakeable evidence that the words 'may be removed,' as herein used, refer only to persons who are officers in the full sense of the word—to persons who, having been elected or appointed to an office, have qualified as provided by law, and have been inducted into office—whose removal is sought for some cause arising after such person has been so inducted. Only to such cases do we understand the section of the Constitution to refer." (See also note 140 to Sayles' Constitution of 1876, page 549.) The statute law under which the removal from office in this case was made, is original in the Revised Statutes, and was enacted under the section of the Constitution cited above, and discussed by Justice Stayton—though the Reporter erroneously calls it article 6; and Mr. Sayles also falls into error, calling it section 8 of article 5. (See article 3388 of his Statutes.) Both principle and authority seem to be clear that the removal of an officer can be made only for offenses committed by him after his qualification for the term from which he is removed.

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Argument for the appellant.

5. The wrongful admission of hurtful evidence, when excepted to at the time, will work a reversal of a conviction, although the injury may not be perceptible. On the trial of this case the State offered in evidence an indictment found at a prior day of the term for a like offense, to the introduction of which defendant objected on the grounds: Irrelevant, incompetent and inadmissible, calculated to prejudice him before the jury, because he has never been tried on said indictment, and is presumed to be innocent of the charges therein contained; and, further, because the fact of indictment found and pending is no evidence of defendant's knowledge of the illegality of the demand for fees; and they being overruled, the paper was let in, to which ruling a bill was saved.

The court, in its charge, limited the use for which the jury could consider it, viz: on the question of knowledge, etc.

The question at once presents itself whether the evidence was admissible for any purpose, and in answer to that question we say:

1. This is not a case in which collateral acts can be introduced for consideration.

2. In no case can an indictment be offered and considered as a collateral act, from which *scienter* may be inferred against a defendant.

3. There was no evidence to show that defendant was guilty of the acts charged against him in said indictment.

4. Before the collateral fact can be put in against a defendant the offense must be proven, and that defendant is the guilty party.

5. Every man is presumed to be innocent until proven to be guilty.

6. The presentation of an indictment affords not even a presumption of guilt.

7. The account made part of the indictment contains three classes of cases, two of which are those indicted:—

1. Cases which were finally tried and disposed of.

2. Cases dismissed by the county attorney, and which were not tried but finally disposed of.

3. Cases that were retired, neither tried nor finally disposed of.

The case on trial was for demanding fees not allowed by law, and were charged to be the second class above.

The indictment being admitted without restriction as to the

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class of cases to consider, left the jury at liberty to draw *scienter* from the third as well as second class above, a class wholly distinct and foreign from the class of cases for which defendant had been indicted and was on trial.

In any view that we can take of the point under discussion, we find nought but hurtful and pernicious error.

W. L. Davidson, Assistant Attorney General, filed an able and interesting argument and brief for the State.

WILLSON, JUDGE. This conviction is under article 240 of the Penal Code, which reads: "If any officer authorized by law to demand or receive fees of office, or any person employed by such officer, shall wilfully demand or receive higher fees than are allowed by law, or shall wilfully demand or receive fees not allowed by law, he shall be punished by fine not less than twenty-five nor more than one hundred dollars for each offense."

The charging part of the indictment is as follows: "That J. M. Brackenridge, in said county and State, on or about the eighth day of November in the year of our Lord, eighteen hundred and eighty-eight, was then and there the duly qualified and acting county judge of said Travis county, Texas, and as such officer was authorized by law to demand and receive fees of said office, and he did then and there as such officer unlawfully, extorsively and wilfully demand from said Travis county fees not allowed by law; that is, he did then and there as such officer unlawfully and wilfully make out an account in writing against said Travis county, and certify that the same was correct, and present the same to the commissioners court, of said Travis county, at a term of said commissioners court, and did then and there wilfully and unlawfully demand that said commissioners court approve said account against said Travis county for the full amount thereof, and order a draft to be issued upon the county treasurer of said Travis county in his, said Brackenridge's, favor for the full amount of said account, when there was embraced in and a part of said account the sum of eighteen dollars which was made up out of a fee of three dollars charged in said account in each of six criminal cases charged for in said account as criminal cases tried and finally disposed of before him, said Brackenridge, as county judge as aforesaid, in the county court of Travis county, Texas, and the said fee of three dollars in each of said six cases, aggre-

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gating eighteen dollars, was not allowed by law, because said cases were not in fact tried and finally disposed of before said Brackenridge as county judge as aforesaid, but were criminal cases which were dismissed in said county court without any trial whatever; that the said cases which said fees were charged for and demanded were the following named, numbered and styled cases in the county court of said Travis county, to wit: No. 3383, The State of Texas v. Abe Roy; No. 3499, The State of Texas v. Jim Smith; No. 3500, The State of Texas v. Joe Brown; No. 3502, The State of Texas v. B. D. Silver; No. 3507, The State of Texas v. Thomas Williams; No. 3521, The State of Texas v. W. A. Kitchens; against the peace and dignity of the State."

Exceptions to the indictment were presented and urged by the defendant, and were overruled by the court; and this ruling of the court is insisted upon as error. The exceptions are as follows: "1. The indictment charges no criminal offense against the laws of the State of Texas. 2. The facts alleged in the indictment do not show a demand for fees not allowed by law. 3. The indictment only charges an application by defendant as a man for the approval of the account indicated. 4. The indictment fails to charge that the act indicted was done and performed in his (defendant's) official capacity. 5. The indictment in whole and in part charges acts outside the performance of official duty."

We will consider the three last exceptions first and together. As we read and understand the indictment, it plainly charges that the defendant, as county judge of Travis county, in his official capacity, and not merely as an individual, demanded fees not allowed by law. Nor does it charge an act outside the performance of official duty, for the law makes it the duty of a county judge to present his certified account to the commissioners court for the fees allowed him by law in criminal cases. (Code Criminal Procedure, article 1076.) In presenting the account in question he was performing an official act, an act which the law required him to perform in the discharge of his official duty as county judge. We hold, therefore, that the third, fourth and fifth exceptions to the indictment are not maintainable.

The second exception presents the question, was the presentation of the account by the defendant, to the commissioners court, a *demand* for the fees therein charged, within the mean-

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ing of the word "demand" as used in article 240 of the Penal Code? We must answer this question in the affirmative. The legal signification of the word "demand," as used in practice, is, "a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting." (Bouvier's Law Dictionary, "Demand.") In this instance, the defendant requested the commissioners court to approve his account or claim against the county, claiming all the items therein charged as correct and legal, and in so doing he *demanded,* in the manner prescribed by law in such cases, the fees which he claimed to be due him by the county. There was no other mode in which he could legally demand said fees. (Code Criminal Procedure, article 1076.) Said exception also presents the further question, were the items of fees specified in the indictment, fees not allowed by law? We must answer this question in the affirmative. A county judge is entitled to demand and receive from the county the sum of three dollars for each criminal action *tried and finally disposed of before him.* (Code Criminal Procedure, article 1075.) He is not entitled to said fee in a case which is merely *dismissed.* A *dismissal* of a case is not a *trial* of it, within the meaning of the law. A dismissal of a case is to send it out of court without a trial upon any of the issues involved in it. It is a final disposition of that particular case, but not a trial of it. A final disposition of a case does not of itself entitle the county judge to the fee allowed by article 1075, supra. To entitle him to the fee the case must have been *tried* and finally disposed of *before him.* He must both try and finally dispose of it. Such is the plain language of the statute. A trial is an examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue. (Bouvier's Law Dictionary, "Trial.")

We are of the opinion that the indictment charges an offense against the laws of the State; that it charges fully and sufficiently the offense of demanding fees not allowed by law, denounced by article 240 of the Penal Code; and that the exceptions to the indictment were rightly overruled.

For the purpose of tending to show a knowledge on the part of defendant that the fees demanded by him were not lawful, the indictment put in evidence by the State over defendant's objection was, we think, admissible testimony. It was offered for no other purpose, and the court fully instructed the jury in

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its charge that it must not be considered for any other purpose. There is a bill of exception in the record calling in question the correctness of the ruling of the court in admitting in evidence the account for fees which was presented to the commissioners court. There is also in the record a bill of exceptions to the charge of the court. Counsel for defendant have not in their brief presented the questions raised by said bills, but we have nevertheless considered the same, and find no error in the ruling or charge. We think the charge of the court present, the law of the case succinctly, clearly and correctly.

By the verdict of the jury the defendant was found guilty as charged in the indictment, and his punishment assessed at a fine of twenty-five dollars. Judgment was accordingly entered upon said verdict in the usual form, and upon the written suggestion of the district attorney the court rendered and embodied in the judgment entry an order as follows: "And it appearing to the court that the defendant, J. M. Brackenridge, was duly elected county judge of Travis county, Texas, at the general election in November, 1886, and thereafter within the time prescribed by law he duly qualified as such county judge, and continued in the exercise of said office until his re-election thereto at the general election on the first Tuesday, being the sixth day of November, 1888; that while in the discharge of his official duties as county judge aforesaid, on or about the fifteenth day of November, 1888, being after the date of his re-election, and before he qualified for the present term of office, the defendant, J. M. Brackenridge, as county judge aforesaid, did wilfully demand fees of said office not allowed by law, as appears from the verdict of the jury and the judgment of the court aforesaid, and that on or about the twenty-first day of November, A. D., 1888, the said J. M. Brackenridge again duly and legally qualified as county judge of said Travis county, and is now the qualified and acting county judge of said Travis county:—Therefore, it appearing to the court that the defendant, J. M. Brackenridge, as county judge as aforesaid, has been convicted by a petit jury for a misdemeanor involving official misconduct, and that said conviction works an immediate removal of said defendant from said office of county judge, it is considered, ordered and adjudged by the the court that the defendant, J. M. Brackenridge, be and he is hereby removed from the office of county judge of Travis county, Texas, and the said office is declared to be vacant."

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Opinion of the court.

It is insisted by counsel for the defendant that the judgment removing from office is unauthorized, because the acts of which defendant was convicted were committed *before* he had qualified as county judge, as his own successor in that office. It is provided by statute that "All convictions by a petit jury of any county officers for any felony, or for any misdemeanor involving official misconduct, shall work an immediate removal from office of the officer so convicted, and such judgment of conviction shall, in every instance, embody within it an order removing such officer." (Rev. Stat., art. 3388.) It is further expressly declared, however, that "No officer shall be prosecuted or removed from office for any act he may have committed prior to his *election* to office." (Rev. Stat., art. 3415.) There can be no question, in view of the last quoted provision of the statute and of the law as settled by the decisions of the courts, that if the acts of which the defendant was convicted had been committed prior to his election to the office, such acts would afford no legal ground for removing him from the office. (Gordon v. The State, 43 Texas, 330; Trigg v. The State, 49 Texas, 645; Flatan v. The State, 56 Texas, 93.) His election would be a condonation of any crime or misconduct committed prior thereto; at a time when he was not holding the office to which he was elected.

But in this case, at the time the defendant committed the act of which he has been convicted, he was the duly elected and qualified county judge of Travis county. He was such officer *de facto* and *de jure*. By virtue of his election and qualification in 1886 he was inducted into the office, and had the legal right to exercise, and was exercising its functions, until his successor should qualify. (Rev. Stat., art. 1133.) By the election of 1888 he became his own successor in the office, which election occurred prior to the commission of the acts of which he has been convicted. It can not be said, therefore, that said acts were condoned by that election. That he had not, at the time of the commission of said acts, been re-inducted into the office by virtue of his re-election does not, we think, affect the question of his removal, because he was in fact and by right the duly qualified county judge of Travis county at the time he committed the acts, and although said acts were committed by him as such officer under and by virtue of his election and qualification in 1886, they were not condoned by his re-election in 1888, occurring prior to the commission of said acts.

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Opinion of the court.

None of the decisions cited by counsel for the defendant in support of their position upon this question appear to us to be applicable. None of them present the case of an officer who succeeded himself and was already in possession of and exercising the functions of the office at the time he committed the acts for which he was removed. They are cases where the parties, though elected to an office, had never been inducted into it—had not qualified, or entered upon the discharge of its functions; and they do not conflict with the view which we entertain of the question as presented in this case, which is that the acts committed by defendant, having been committed subsequent to his re-election, were not condoned, and constituted ground for his removal from the office, although at the time of their commission he had not qualified under his re-election.

But it is contended by counsel for defendant that the acts for which the defendant has been convicted do not involve official misconduct, and do not, therefore, constitute ground for removal from office. By official misconduct is meant any unlawful behavior in relation to the duties of his office, wilful in its character, of any officer intrusted in any manner with the administration of justice, or the execution of the laws, etc. (Rev. Stat., art. 3393.) We do not hesitate to say that an officer who wilfully demands fees not allowed by law is guilty of official misconduct wilful in its character, and that a conviction of that offense is a conviction involving official misconduct within the meaning of the statute (Rev. Stat., arts. 3388, 3393), and not only warrants but demands his removal from the office.

It is made to appear, in a motion for a new trial supported by affidavits, that one Doss, who served on the jury in the trial of the cause, was not a qualified juror in Travis county; that he was not a householder in said county, nor a freeholder in the State, and that he was not a resident of said Travis county; that said juror, before being impaneled, had been interrogated touching his qualifications, and had answered under oath, to the court, that he resided in said Travis county and was a qualified voter in said county; that said Doss was a stranger to defendant, and that neither the defendant nor his counsel knew, or had reason to believe, that said Doss was not a qualified juror, and regarded his statement under oath that he was qualified as true. It is further made to appear that said Doss, before being impaneled upon said jury, made statements which indicated that he was prejudiced against the defendant, of

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which statements the defendant and his counsel were ignorant when he was accepted as a juror. The district attorney filed a written denial of the truth of the above recited facts, but introduced no evidence in behalf of the State upon the issue thus formed; at least there is no evidence in the record before us controverting the defendant's testimony in support of said ground of his motion for a new trial. We must therefore hold that the facts set forth in said motion in relation to said ground, and which we have substantially recited, were established by the affidavits accompanying said motion.

Said facts being true, the defendant has been tried and convicted by a person not qualified to serve as a juror in the case, and whom the evidence tends strongly to show was prejudiced against him, and this without any negligence or fault on the part of either the defendant or his counsel. We are of the opinion that because of this ground the defendant was entitled to a new trial, and that the court erred in not granting his motion. Boren v. The State, 23 Texas Ct. App., 28; Armendares v. The State, 10 Texas Ct. App., 44; Hanks v. The State, 21 Texas Ct. App., 526; Henrie v. The State, 41 Texas, 573; Code Crim Proc., art. 631.) We are not prepared to say that by reason of the disqualified juror the defendant suffered no injury to his rights, even were we at liberty to consider that question.

There are other questions made in the record which we do not discuss or determine, because they are unimportant in view of the fact that they are of a character which may not arise on another trial.

Because the court erred in refusing the defendant a new trial because of the disqualification of the juror Doss, and upon such ground alone, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered May 8, 1889.

Judge Hurt is not prepared to assent to or dissent from the conclusion of a majority of the court as to the *demand*, but concurs in the other views expressed in the opinion.

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Statement of the case.

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No. 6336.

M. L. ALEXANDER v. THE STATE.

1. PLEADING.—INDICTMENT OR INFORMATION is not bad for duplicity because it contains several counts charging different misdemeanors.
2. SAME.—It is not required that each and every count in an indictment shall conclude with the words "against the peace and dignity of the State," it being sufficient if the instrument as a whole so concludes.
3. CARRYING PISTOL INTO A PUBLIC ASSEMBLY, ETC.—Article 320 of the Penal Code defines the offense of going into a church, school room or other place where people are assembled for amusement, etc., having a pistol about the person. The persons excepted from the operation of this article by article 321 are peace officers only, and do not include even the owner of the premises in which the people are assembled. A school teacher does not come within the exceptions provided by the said article 321, and is not authorized to carry a pistol about his person in his school room, among his pupils, nor on the occasion of a public assembly in his school room.
4. SAME.—That the accused had reasonable ground for fearing an unlawful attack upon his person is not an available defense to a prosecution for a violation of article 320 of the Penal Code. But see the statement of the case for evidence *held* insufficient to support such defense even if available.

APPEAL from the District Court of Williamson. Tried below before the Hon. D. S. Chessher, County Judge.

Appellant, by information based upon affidavit, was prosecuted in the county court of Williamson county for three offenses. The charging part of the information is as follows: "That M. L. Alexander on or about the eighth day of February, A. D. 1889, in the county of Williamson and State of Texas, and anterior to the presentment of this information did unlawfully carry on or about his person a pistol, and did then and there unlawfully go into a place, to wit: the building known as the Corn Hill college, where persons were assembled for amusement, and did then and there have and carry about his person a pistol, and did then and there go into a public place known as the Corn Hill college there situate, at which people were assembled for purpose of amusement, and did then and there rudely display a pistol in a manner calculated to disturb the inhabitants of said public place; against the peace and dignity of the State."

Appellant filed a motion to quash the affidavit and informa-

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tion, upon the ground that said papers were bad for duplicity in charging three distinct offenses in one count. This motion was overruled and he excepted. He pleaded not guilty and submitted the case to the court upon the evidence. The court adjudged him guilty of the second offense set out in the information, and assessed his fine at fifty dollars. He excepted to the judgment, filed a motion for new trial, which was overruled, and he appeals to this court.

W. W. Morris testified, for the State, in substance, that on the night of February 8, 1889, the defendant, in connection with the pupils of his school, gave an entertainment in the school house in Williamson county known as the Corn Hill college. The said entertainment, as advertised, was to comprise vocal and instrumental music and declamation and dialogue. Witness went to the said school house, and while standing at the door on the outside with Frank Cook, Dick Shaver, Albert Hill and Henry Hill, he saw a lady and her child refused admittance and turned away by one of the door keepers because she either could not or would not pay the admission fee of ten cents. Witness then determined to go into the school house without paying, and did so in company with Cook, Shaver and the two Hills. Immediately after the witness and his party took their seats, and while an instrumental piece was being rendered by some young ladies, the defendant left the platform or stage, and went down stairs. He soon returned, stood in and looked carefully over the room. Several persons in the audience remarked audibly: "He's looking for Burnham." Defendant then mounted the platform and went to the piano where the young ladies were still playing. They stopped playing about the time defendant reached the piano, and the curtain was lowered. Within a few moments defendant appeared on the stage in front of the curtain and remarked: "Some parties have entered, and are now in the room, who have not paid the admission fee. If they are gentlemen they will retire." He then read aloud, from a paper, the names of the witness and the four young men who were with him, viz: Cook, Shaver and the two Hills. Witness stood up and asked if he could speak a word. Defendant replied that he could, and witness said: "I have come up here without paying; I don't intend to pay, and I am not going down." Witness then resumed his seat, his words creating general confusion, but principally among the women and children, many of whom manifested a purpose to leave.

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Statement of the case.

In replying to what the witness had stated, the defendant said, among other things: "You have no more right to come in here without paying than I have to go into a store and take goods without paying." This insinuation, that the witness was a thief, angered him, and, after a few more words, the witness, followed by Cook and Shaver, advanced towards the platform on which the defendant was standing. When witness reached a point within about six feet of defendant, defendant drew a pistol, covered witness with it, and ordered him to stand back. The witness stepped back and called Dr. McCarty's attention to the pistol in the possession of defendant. By this time about half the audience had left or were leaving the room. Defendant called to them not to leave, that no one would be hurt, as he was going to have an officer there to keep order. He then attempted to get somebody to go after Burnham, the constable, but no person would go until witness requested a boy to do so When Burnham arrived the witness and his crowd left the school house. Witness had no pistol, and he saw no pistol on that night except the one defendant had. Witness made no demonstration nor threat when he started toward defendant.

On his cross examination the witness stated that he knew the entertainment was a pay concern before he went to the school house. The lady referred to by witness was turned off by the door keeper for refusing to pay the admission fee Witness did not know whether the lady refused to pay the fee because she did not have the ten cents, or merely because she would not pay it. There was no understanding between the witness and Cook, Shaver and the Hills to go to the school house and attend the entertainment without paying. As the witness and his party started up stairs into the entertainment hall, the witness blew out the light and pushed out of his way a door keeper who demanded ten cents of him and tried to bar his way. About that time Cook remarked to Shaver: "Let's pay our dimes." They turned to a doorkeeper as if to do so, when witness called to him: "Don't do that, boys; come with me"—which they did without paying their way.

Frank Cook and Albert Hill testified, for the State, substantially as Morris did, denying that any previous understanding to go into the school room without paying existed between the parties named. Hill denied that, previous to the entertainment, he told John Sybett that he was going to attend the entertainment and was not going to pay to get in.

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Opinion of the court.

The school trustees for the Corn Hill free school community testified that the defendant was regularly employed by them on behalf of the school community to teach the public school, and that he taught that school in the building in which the entainment was given on the night alleged in the information. Defendant had the keys to and was in full possession of said school building, by consent of the said trustees. The public entertainments on this and previous occasions were given by the defendant and his pupils with the knowledge and consent, and under the active encouragement of the trustees. An admission fee, to be applied to the payment of a stove for the school room, blackboards, charts, library, etc., was charged at each occasion with the full knowledge and consent of the trustees.

A witness for the defense who testified to the transaction in the school house during the entertainment narrated it substantially as did the witness Morris.

Several witnesses testified, for the defense, that at different times recently before the entertainment they heard various parties living in Corn Hill, who were opposed to the practice of pay entertainments in the public school house, declare that they intended to force their way into the next entertainment without pay. One of those witnesses fixed the time of such threats as late as the day of the night on which the offense is alleged to have been committed. Several of said witnesses declared that they reported the said threats to the defendant. None of the witnesses named the defendant as a party who uttered such threats. This is the testimony upon which the defense of an anticipated "unlawful attack" was based.

T. B. Cochran, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It is not a valid objection to an indictment or information that it contains several counts charging different misdemeanors. (Waddell v. The State, 1 Texas Ct. App., 720; Gage v. The State, 9 Texas Ct. App., 259.) In this case the information charges three different misdemeanors in three separate counts, and is not bad for duplicity. The counts are informal, but it is nevertheless plain that they were intended for, and are substantially separate counts, and should not be construed as constituting but a single count. It is not required

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that each count should conclude "against the peace and dignity of the State," but only that the indictment or information as a whole should so conclude. (West v. The State, ante.) The exceptions to the information were properly overruled.

This conviction is upon the second count in the information, which charges the offense defined in article 320 of the Penal Code. It was proved and not controverted that the defendant went into a place where persons were assembled for amusement, carrying about his person a pistol. His defenses were that the place where he carried the pistol was his own premises, and that he had reasonable ground for fearing an unlawful attack upon his person, etc.

With respect to the first defense this court has held that no person, unless he be a peace officer, can go into an assembly of people such as is named in article 320 of the Penal Code, and carry about his person a prohibited weapon, without violating the law, and not even the owner of the premises where the assembly is, is excepted. (Owens v. The State, 3 Texas Ct. App., 404; Brooks v. The State, 15 Texas Ct. App., 88.) Such, we believe, is the meaning and intent of the law, though we confess that to our minds the provisions of article 321 of the Penal Code are somewhat obscure. We can not believe that it was the purpose and intent of the Legislature to permit school teachers to carry prohibited weapons upon their persons in their school rooms among their pupils, or on the occasion of public assemblies in such school rooms. The law does not in terms accord to them such a privilege, and, without a clearly expressed exception in such case, this court will not sanction a defense, the effect of which would be to authorize every school teacher in the State to carry prohibited weapons upon his person in our school rooms. Such an effect could not be other than pernicious, and should not be tolerated.

As to the second defense, we do not think it was available in a prosecution upon the second count, but, even if it was, we do not think that it was sustained by the evidence, it not being shown that any such danger existed as the statute contemplates, or that the defendant had reasonable grounds for fearing an unlawful attack upon his person.

Believing that there is no error in the conviction, the judgment is affirmed.

Affirmed.

Opinion delivered May 8, 1889.

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No. 6217.

LUM WOOD *v.* THE STATE.

INFORMATION is insufficient to charge an offense unless it concludes with the words: "Against the peace and dignity of the State." The complaint, however, being a good one and sufficient to sustain an information, the cause is not dismissed, but is remanded in order that a valid information may be filed upon the complaint.

APPEAL from the County Court of Callahan. Tried below before the Hon. J. McIlhaney, County Judge.

The conviction was for carrying a pistol, and the penalty assessed by the verdict was a fine of twenty-five dollars and twenty days in the county jail. The opinion discloses the case.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. The information upon which the conviction in this case is based is fatally defective, because it does not conclude "against the peace and dignity of the State." (Code Crim. Proc., art. 430; Thompson v. The State, 15 Texas Ct. App., 39.) Wherefore the conviction must be and is set aside; but, the complaint being in all respects a sufficient one, a valid information may be presented upon it, and the prosecution will not therefore be dismissed, but the cause is remanded that another information may be presented should the county attorney see proper to so do.

Reversed and remanded.

Opinion delivered May 8, 1889.

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Statement of the case.

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No. 6270.

AUGUST ZWICKER v. THE STATE.

1. MURDER—VERDICT.—The statute expressly requires that in convictions for murder the verdict shall specify the degree of murder of which the defendant is found guilty. The failure of the verdict to so specify the degree is cause for reversal.
2. REASONABLE DOUBT—CHARGE OF THE COURT.—The trial court instructed the jury as follows: "The defendant is presumed by the law to be innocent until his guilt is established by competent evidence to the satisfaction of the jury, beyond a reasonable doubt; and if you have on your minds arising from the evidence a reasonable doubt as to the guilt of the defendant, you will find him not guilty." *Held*, sufficient on the doctrine of reasonable doubt, and not obnoxious to the objection that it "requires either the State or the defendant to introduce affirmative evidence of the defendant's innocence;" nor to the further objection that it contravenes the rule that a reasonable doubt may as well arise from a want of evidence as from evidence introduced before a jury.
3. DRUNKENNESS—CONFESSIONS—EVIDENCE.—The defense requested the court to charge the jury in effect that if they believed the defendant was so drunk that he did not realize what he was saying, when he made his confession, such confession should not be considered as evidence against him. *Held*, that the requested instruction was properly refused because it not only rested upon no evidence of drunkenness, but that pretense was refuted by the proof.

APPEAL from the District Court of Denton. Tried below before the Hon. D. E. Barrett.

The indictment charged the appellent with the murder of J. S. Ferguson, in Denton county, Texas, on the first day of January, 1888. The jury found the defendant "guilty as charged in the indictment," and assessed the penalty at a life term in the penitentiary.

S. Ferguson, the father of the deceased, was the first witness introduced by the State. He testified that the deceased was killed at his house, in Denton county, Texas. He was shot about half past seven o'clock on the night of January 1, 1888, and died early on the next morning. The deceased's house fronted east, the parlor being the east room. The bay window occupied the center of the east end of the parlor. A public

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road running north and south passed the front of the house at a short distance. The fatal shot was fired through the bay window, the half of one of the blinds of which was open. When he received his death wound the deceased was lying on a sofa or lounge in his said parlor. Powder stained the window sash, and the shot broke out about two-thirds of the window glass. The glass was broken out about four feet from the ground. The shot took effect in the left side of the head, one shot striking the arm. Witness picked up four or five common sized buckshot in the parlor. The couch, the wall at a point beyond where deceased's head lay, and an organ stool, showed shot marks. The front fence at deceased's house was about six rods distant from the front door. A plank walk led from the front gate to the front door. The road east of the house was sandy and tolerably dry. The yard east and south of the house was overgrown with Bermuda grass.

On his cross examination the witness said that he was at his home, about a mile and a half distant from deceased's house, when the shot was fired. He reached the deceased about an hour after the shooting. Deceased was then alive, but died about two o'clock on the next morning. The witness knew Rufe Street and Bill Maury. He did not see the said Street on the morning after the murder. He saw Bill Maury at deceased's house early next morning. The said Maury then told the witness that he thought he had a clue to the assassin, and showed the witness what he said was the measure of a man's track. Witness told Maury if he had a clue to follow it up. He did not hire Maury to trace the murderer, but told him that if he did find him, he, witness, would pay him for his trouble. This conversation between witness and Maury occurred at deceased's house a little after sunrise on the morning after the assassination. The witness employed E. C. Smith to assist in the prosecution of this case, but had nothing to do with the employment of Owsley & Walker as special prosecuting counsel. A large number of the residents of the neighborhood congregated at the house of the deceased after the shooting, on the fatal night.

W. B. Lee testified, for the State, on January 1, 1888, he lived near Elizabethtown in Denton county, Texas. Defendant then lived with Andy Peterson, west of Elizabethtown, and about a mile and a half distant from witness's house. Andy Peterson and the defendant's brother, Otto Zwicker, driving a bunch of yearlings, passed the witness's house on the evening of Sun-

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day, January 1, 1888. Another man, whom witness would not attempt to identify, passed his house that evening, about two o'clock. He was walking, and traveled from west to east on the Roanoke road. That person could have either gone to Roanoke on that road, or have turned off on another road and gone across Denton creek. Witness took no particular notice of that man, who was about a quarter of a mile distant from him. He did not know where Homer Smoot lived at that time. Witness never told Bill Green or Ike Davis, soon after the arrest of defendant, that the State would have no trouble in tracing the defendant as far as his, witness's, house, as he, witness, could testify to seeing him pass his house on the evening of the fatal day, going in the direction of deceased's house.

Ed Smoot testified, for the State. that, on January 1, 1888, he lived about five or six miles east of Elizabethtown. On the evening of that day, about two hours before sundown, the witness, his brother being with him, saw a man on foot in his pasture. He was traveling the road that led through the pasture, entering said pasture at the gate on the southwest corner, and going out at the northeast corner. At the outside of the pasture at the said northeast corner, the road forked, one of the forks leading to Denton, and the other off east towards Rufe Street's house. The man seen by witness traveling through the pasture on the said evening had a bundle on his back, about three feet long, done up in a "slicker." Under the impression that the man was a tramp, witness hallooed to him, but he made no reply. Witness did not see the man's face, and did not recognize him as anybody he knew. He, however, observed somewhat carefully the man's appearance as to form and build, and, a few days after the arrest of the defendant, pointed him out of a number of prisoners in jail as the one man in jail who resembled the man he saw in his pasture on the said Sunday evening. Witness was not then acquainted with defendant. Deceased lived about ten miles east from witness's pasture. Will Smoot, the brother of Ed Smoot, testified to substantially the same facts, and declared that there was no appreciable difference in the general appearance of the defendant and of the man they saw in the pasture on the said Sunday evening. Will and Ed Smoot were sons of Homer Smoot.

Lem Card testified, for the State, that on January 1, 1888, he lived about three miles east of the place of Homer Smoot. About an hour before sunset on that evening a man on foot

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passed the witness's place at a distance of between three and four hundred yards going east. He had a long bundle on his shoulder or back. That man, whom the witness could not recognize at the distance, walked rapidly, and traveled towards the houses of Rufus Street and A. J. Stykes. Deceased lived southeast of the witness.

On cross examination the witness said that his house was two or three miles distant from Rufe Street's house. Smoot's pasture was west from witness's house. The road to Roanoke via the witness's house did not pass Smoot's pasture. The man seen by the witness on the evening of the fatal Sunday was not traveling in the road, but was going easterly through the brush towards Street's house. From the point where witness was when he saw the man, it was southwest to the northwest (northeast?) corner of Smoot's pasture. On his re-examination the witness said the man, when he saw him, was east of Smoot's pasture, about three-quarter's of a mile distant, and west of Stykes's house, going towards said house.

A. J. Stykes testified, for the State, that he was at home on the evening of the fatal Sunday. He did not see any person pass by or through his premises on that evening, but before night he discovered an uncommonly large foot track in the orchard south of his house. The said tracks, only two of which the witness noticed, pointed towards the house of Rufe Street which was about one mile southeast from witness's place. Witness's wife was at home on that evening.

Mrs. A. J. Stykes testified, for the State, that late on the evening of the fatal Sunday she saw a man climb the fence from the orchard into the field south of her house, and go off through the field towards Rufe Street's house. That man had a bundle on his back which in shape resembled a fiddle. The sun was then about a quarter of an hour high.

Rufus Street testified, for the State, that now and on the first day of January, 1888, he lived in Denton county, Texas, about thirteen miles south of the town of Denton. Deceased lived four or five miles southeast from witness's house. The witness knew the defendant and saw him on the fatal Sunday evening. On that evening a man came to witness's house inquiring the way to the house of Pat Street, the brother of the witness. Witness went with that man to Pat Street's house, to show him the way; left that man at Pat's house and returned to his home. En route home, and at a point in the road near his house, the

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witness met the defendant, who was on foot traveling the Roanoke and Lewisville road. Witness stopped the defendant with the remark: "Hallo! You are the man who had the law suit with Ferguson." Defendant replied that he was the man. Witness then asked him where he was going, and he replied that he was going across Denton creek to work for a man. Witness then asked him if he was still living at Peterson's. He replied that he was not. Witness then remarked to him: "You will be late getting to where you are going." Defendant replied: "Yes, but I want to get an early start at work to-morrow morning." He then asked witness the way to Maury's house. Witness directed him and he left, when witness climbed the fence and went home.

The point where witness met the defendant was at the south-east corner of witness's place, in the road which, at that point, ran north and south, and the hour was a few minutes—less than fifteen—before sunset. While conversing, the witness and defendant stood on opposite sides of the road, about three feet apart. Defendant then had on his shoulder a long package that was broader at one end than the other. The package was tied with a rope and swung from a stick which defendant carried over his shoulder. Witness had previously met the defendant at a late term of the county court in which a suit was pending between the Zwickers and the Fergusons. Witness was in attendance upon that term of the court as a regular juryman. On Monday, January 2, 1888, being the day after witness met the defendant in the road, and the day following the assassination of deceased, witness went to Denton to attend the public estray sale, and heard of the assassination of deceased on the previous night. That information was imparted to him by Bill Maury in Kinkaid's wagon yard. Witness then told Maury that he saw the defendant in the road near his, witness's, house, late the previous evening. On the morning of the next day, Tuesday, witness went with Bill and Riley Maury to Peterson's house for the purpose of pointing out the defendant as the man he met in the road on the evening of the fatal Sunday.

When witness and the Maurys reached Peterson's house they found Andy Peterson in his orchard; after talking with him a short while, they went to a shop near the house. Outside of and near the said shop they found the defendant, who appeared to be mixing paint in a bucket. He had a shoe on one foot and

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a wooden bottom slipper on the other, and was wearing the same coat and hat that he had on the previous Sunday evening. Witness identified the defendant at once and told Bill Maury that he was the man he met on the previous Sunday evening. They then took the defendant to the field where his brother Otto Zwicker was plowing, and witness again pointed out defendant to Bill Maury as the man he saw on the previous Sunday evening. The witness examined the defendant's foot on which he wore the wood bottomed slipper, but could discover no bruise on it. The foot may have been a little swollen, but if so witness did not observe it. The foot was wrapped with a rag on which there was a quantity of salve, but if the skin was broken or bruised the witness failed, after careful search for bruises or breaks, to discover it. Defendant had very large feet. From the field the witness and the Maurys took defendant to the house, where they got his other shoe and another hat, and thence they took him to Roanoke.

On his cross examination the witness said that when he met the defendant in the road on the evening of the fatal Sunday he observed the bundle he carried on his back, but only close enough to observe its shape, and that it was wrapped in what appeared to be a slicker. The interview between the witness and the defendant on the said Sunday lasted not more than two minutes, during which time the witness observed that defendant wore a black flopped hat and patched pants. It was on a public road that witness met the defendant,—a road flanked on either side by a fence, but was not what the witness would call a lane. Defendant was turning the corner of the fenced road or lane when witness first saw him. The witness was in the grave yard, digging a child's grave, when Bill Maury came for him on Tuesday to go to Peterson's. Witness at first told Maury that he felt unwell and did not want to go to Peterson's, but did not ask Maury if there was any money in going to Peterson's with him. Maury replied to the effect that old man Ferguson had agreed to pay well for working up the case. Witness did not tell Maury on that Tuesday morning that "the Dutchman told him (witness) on Sunday evening that he had left Peterson's." Riley Maury applied a stick measure to the man's track that was found near the witness's tank. The ground was wet at that point, and it looked like the man's foot had slipped. The stick measure did not appear to fit the track. Witness then asked the Maurys to go to the road near

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his house where he met the defendant on the previous Sunday, and there measure the defendant's tracks, but they did not go.

En route to Peterson's, the witness and the Maurys went by Roanoke, crossing Denton creek near Walnut Grove school house. At a point just beyond Denton creek they found a man's track of very large size. That track was in the public road and showed that it was made by a man traveling toward Roanoke. Bill Maury got off his horse and measured that track. Witness and the Maurys ate dinner at Roanoke, bought a pint of whisky, and went thence to Peterson's house. They had no other whisky on that day. From Peterson's house they took defendant to Roanoke, and thence by rail to Denton. Witness saw John Bacon on the train between Roanoke and Denton, and told Bacon that the Maury boys had the defendant in an adjoining car, under arrest for killing deceased. At the same time he told Bacon that the Maurys wanted him, Bacon, to go into that car, talk to defendant, and see if he could not get him to confess. Bacon replied that it was not worth while, as the train would soon reach Denton. Witness was not drunk while on the train between Roanoke and Denton. Witness denied that he ever told Jonas Forrester that he had spent two hundred dollars on this case, and did not know how much it would eventually cost him. On Tuesday, witness asked Dick Maury if he did not, on the previous Sunday, meet a man with a budget on his back, and Dick replied that he did. Peterson's house was between fifteen and sixteen miles distant from deceased's house. Witness did not attend the funeral of deceased nor did he visit the deceased's house after the killing. Witness told Constable Sullivan, on Monday morning, about seeing defendant on the road on Sunday evening. Witness had not uttered an oath in five or six years.

The point on the road where witness met the defendant on the evening of the fatal Sunday, was between the Adams and Taylor places, and within a quarter of a mile of witness's house. He was coming from the direction of witness's house towards witness, who was returning to his home from the house of his brother Pat. He was turning the corner of witness's fence when witness first saw him. The witness spent Sunday night at the residence of the widow Heath, and got home between nine and ten o'clock on Sunday morning. He was at his home on the fatal Sunday night. Hannibal Street, witness's brother, who lived with the witness, was also at home that night. When

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witness left home next morning to go to the estray sale in Denton, he left his brother Hannibal at home. It was late in the evening when he left Denton, and between eight and nine o'clock at night when he reached home. While talking to Bill Maury in Kincaid's wagon yard in Denton on the said Monday morning, the witness asked him if "that Dutchman" did not come to his house on the previous evening. Pat Street had a double barrelled shot gun at his house on January 1, 1888, but witness had no gun of any kind at that time, either at his house or elsewhere. Witness and deceased had a difficulty in Denton some time prior to the assassination, but at the time of the killing witness had no particular hard feelings towards deceased. Witness and Bill Fry had a talk with him on the day that the difficulty occurred between witness and deceased, and witness then told Fry that deceased was trying to raise a fuss with him. Deceased followed the witness about town on that day, but witness did not follow him. The witness denied that, on that day, he applied to R. C. Scripture for the loan of a pistol. He had a talk with said Scripture and asked him if he, Scripture, had heard of what deceased had said about witness. The witness knew Dr. Bush and had heard of Mr. Seagroves. Witness and the Maurys, when en route to Roanoke with the defendant on Tuesday after the killing, met Dr. Bush and another man near a house between Peterson's house and Roanoke. Dr. Bush asked witness what the party was doing with defendant. Witness replied that he, defendant, was under arrest by the Maurys for the murder of deceased. The witness and the man with Dr. Bush had a conversation in the presence of Bush and the two Maurys. In that conversation witness asked that man if he saw the defendant on the previous Sunday evening, but did not say to that man: "Ferguson was a d—d rascal, and if defendant hadn't killed him I would have killed him." He made no such statement to Dr. Bush. En route home from Pat Street's on the fatal Sunday evening, witness passed Wakefield's place and saw John Wakefield.

John Wakefield testified, for the State, that he lived about two miles west from the deceased's house. About an hour before sunset on the evening of the fatal Sunday, the witness Rufe Street passed the witness's house, going towards his home. Between thirty and sixty minutes later a man, whom witness did not recognize, traveling on foot, passed witness's house going towards Yokeley's store, over the road which passed by

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the house of the deceased. That man had a bundle on his back which looked like, and which witness took to be a gun case.

Dick Maury was the next witness for the State. As shown by a diagram in evidence this witness lived at or near the crossing of two roads. The road leading east from his house passed by the house of Mr. Bond, a quarter of a mile distant. The witness stated in substance that, about dusk on the fatal Sunday, he and his two sisters left home in a buggy to visit at Mr. Bond's house. En route they met a man on foot traveling north towards the point of intersection of the two said roads. That man had a budget of some kind on his back.

William Sparks, sheriff of Denton county, testified, in substance, that on the night of Tuesday, January 3, 1888, about twelve o'clock, jailer Boyd came to witness's boarding house, waked witness and told him that the man who killed deceased was in jail, and, in effect, that the said man had confessed to the murder of deceased. Witness went with Boyd to the jail, where he found Boyd's brother and young Mr. Ritter. He had no recollection of seeing either of the Maurys, or Fry or Rufe Street at the jail, though jailer Boyd told him that the latter was put under arrest and confined. On arriving at the jail Boyd, or somebody else, threw off the brakes and defendant came into the corridor from the cells. Witness said either "you are" or "are you the man who killed Ferguson?" Defendant replied: "I am." Witness said to him: "I want to inform you that if you make any statement in regard to the killing of Ferguson, it may be used in evidence against you, and if you make any statement to me about it I want you to state the facts just as they exist." Defendant then said that on "trial" day Rufe Street told him that he, Street, would give him, defendant, fifty dollars to kill Ferguson; that he, defendant, left home on the fatal Sunday and went by Rufe Street's house; not finding Street at home, he went on and met Street a short distance beyond the house, when Street directed him how to go on to Ferguson's house; that he, defendant, then went on to Ferguson's house, and fired through a window and shot Ferguson. He said that he fired but one shot, and that from a shot gun, and that he then left, going through the yard into the big road.

Cross examined the witness said that he understood from the defendant's statement that Street paid him fifty dollars. The place where the conversation between witness and defend-

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ant took place was in the southeast corner of the corridor of the jail, about eight feet from the cells. The conversation was carried on in an ordinary tone of voice, the witness and defendant being separated by the iron grating. Witness visited deceased's house before the confession of the defendant, and saw the lounge on which deceased was said to have been lying when shot. There were shot marks on the said lounge. Witness understood that one of the window blinds was open at the time the shot was fired. Defendant appeared to witness to be perfectly sober when he made his confession. The witness had not been drinking, and he detected no odor of liquor on the breath or person of defendant. Defendant spoke in broken English, but was readily understood by witness, and witness presumed from his manner that he, defendant, understood witness's warning, that whatever statement he should make about the killing of deceased, would be used in evidence against him. Defendant was apparently a man of average intelligence. Witness knew nothing about what transpired between Rufe Street, the Maury boys and defendant during the time that the latter was in the custody of the former. If the Maurys or Street threatened, or made promises to the defendant in connection with the murder of Ferguson, witness did not know it.

W. S. Fry testified, for the State, that he was town marshal of Denton in January, 1888. Between eleven and twelve o'clock on the night that defendant was put in jail Rufe Street came to witness's gate, called witness and told him that the man who killed Ferguson was up town. Street, who appeared to be very much excited, did not then say that the man was in custody. Witness told Street to go back to town and that he would follow in a few minutes. A few minutes later witness went up town and found Street and the two Maurys with the defendant at Paschal's saloon. The Maurys and defendant came out of the saloon as the witness got to the door. Street remained in the saloon. One of the Maurys had a handcuff on the defendant. Witness opened a conversation with defendant, during which Maury said nothing that witness could remember. Street soon came out of the saloon, and he, the Maurys and witness went to the jail with defendant. Witness remembered no conversation that occurred at the jail. When he met the Maurys and defendant at the saloon, witness asked one of the Maurys: "Is this (referring to defendant) the man?" Maury replied: "Yes; he says he killed Ferguson." Witness put de-

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fendant in jail at once, but did not remember that he did or not tell Boyd at the jail that defendant confessed to the killing of deceased.

J. G. Boyd testified that he was jailer of Denton county in January, 1888, when the defendant was put in jail for the murder of Ferguson. Bill Fry, Bill Maury, Rufe Street, and, the witness thought, Riley Maury, brought defendant to the jail a few nights after the assassination of Ferguson. Fry said to witness, referring to defendant, who was handcuffed: "This is the man who killed Ferguson." Riley Maury then, or a few minutes later, told witness that defendant had confessed to killing Ferguson. Witness was unable to say whether or not all of the parties with defendant then went into the jail, but it was his impression that they did. After putting defendant in a cell, the witness went to Sheriff Sparks's boarding house and notified him that the man who killed Ferguson was in jail. The first words spoken by Sparks to defendant were: "Are you the man who killed Ferguson?" Defendant replied: "Yes, sir." Sparks then said: "If you have anything to say about the killing I would like to hear it, but I must warn you that whatever statement you make about it can be used in evidence against you." Witness did not hear what, if any, direct reply defendant made to that warning, but he told Sparks that he entered Ferguson's yard at the north side, and went out at the east side; that he fired through a window with a shotgun and killed Ferguson; that a light was burning in the parlor at the time; that he fired but one shot and immediately climbed the east yard fence and got into the big road; that in going to Ferguson's house he went by Rufe Street's house, but did not find said Street at home; that he went on and met Rufe Street in the road near Rufe's house, when Rufe Street paid him fifty dollars to kill Ferguson. When placed in jail the defendant had on a pair of shoes of unusual size, being eleven or twelve in size, and quite two sizes larger than the shoes worn on this trial by defendant. Defendant took off his coat when he entered his cell, and witness hung it up on the south wall outside of the cages in the corridor. No person handled that coat that night so far as witness knew. No person other than Sheriff Sparks entered the jail that night after witness and the Maurys and Fry left. On the next morning witness and Mr. Mars searched the defendant's coat and in the pocket found a part of the hull of a recently exploded cartridge.

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On cross examination, the witness said that while he was searching the person of the defendant in the jail, Fry took Rufe Street's pistol and notified Street that he would also be put in jail. If Street was in the far end of the cell at the time that defendant made the statement to Sparks, he would have been about twenty-five feet distant from Sparks and defendant. Sparks and defendant talked in a somewhat suppressed tone of voice. They might have been heard, but most probably not understood, by a person in the far end of the cell. The witness declared that, in his opinion, it was impossible that the piece of cartridge hull was placed in the defendant's pocket after the coat was hung up in the corridor of the jail. It might have been placed in that pocket by some third person before the defendant was put in jail. The witness considered the defendant to be thoroughly sober when placed in jail, but he thought Bill Maury was drinking a little. Defendant was a man of more than average intelligence. He spoke broken but intelligible English.

John Bacon testified, for the State, that he was in the sleeping car of the train on which the Maury boys and Rufe Street took the defendant from Roanoke to Denton, on the night of January 3, 1888. When the train reached a water tank about two and a half miles from Roanoke, and while it was waiting there for the removal from the track, at a point ahead, of a recent wreck, Rufe Street came into the sleeper and told witness of the assassination of John Ferguson on New Year's night. He also told the witness, the conductor of the sleeping car, and two other gentlemen, that the Dutchman who committed the murder was on the train under arrest. Witness asked him how he knew the man he had was the man who killed Ferguson. He replied that the man was seen going in the direction of Ferguson's house on the fatal evening, with a gun wrapped in a slicker or bundle. Witness asked him who saw the man going toward's Ferguson's house. He replied that a man named Maury and one named Heath saw him. He then detailed what he termed evidence pointing to the guilt of the man he had in charge, and said that he wanted to bring that man into the smoking apartment of the sleeper to be interviewed by the witness and the other gentlemen. In that connection he requested that, when he should bring the man into the said smoking apartment, the witness and the gentlemen with him should tell the man that they were detectives,

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and knew all about the killing of Ferguson, and advise him to confess and make a detailed statement about the assassination. The witness declined to have anything to do with the proposed scheme. The train remained some time at the tank, and Street left the sleeper, after remaining in it at least thirty minutes before the train left the tank. Street, who the witness thought was pretty drunk, said that the Dutchman had confessed to the killing of Ferguson.

Dan Griffith testified that he was at the depot in Roanoke when the defendant left on the train for Denton, in the custody of Rufe Street and the two Maurys. During the hour and a half preceding the departure of the train for Denton the witness saw the defendant take two moderate drinks from a bottle furnished by Newt Graham. He could not say that defenant was not sober. Neither he nor Will Maury walked like drunk men. Some men could walk straight when drunk.

J. W. Nichols testified, in substance, that he was at the depot in Roanoke on the night that defendant was taken to Denton by Street and the Maury boys. Bill Maury, whom witness had never seen before, saw witness talking to defendant before the arrival of the train. Induced perhaps by the apparently confidential relations existing between witness and defendant, Bill Maury requested witness to take defendant into a corner of the depot and advise him to confess as a means of securing lighter punishment; to tell him that his punishment would be less severe if he would inculpate his accomplice or accomplices, if he had any, and, if necessary, to frighten him into a confession by telling him that by confessing he would avoid the danger of being mobbed on reaching Denton. Witness took defendant into a corner of the room and had a suppressed private conversation with him, in the course of which he advised defendant as requested by Bill Maury.

W. T. Maury testified, for the State, that, two or three days after the killing of Ferguson, he and his brother Riley Maury and Rufe Street went to the house of Andy Peterson, about a mile and a half northwest from Elizabethtown, and arrested the defendant. From Peterson's they took defendant to Roanoke, reaching Roanoke about dusk. Leaving the defendant in a grocery store in the custody of Rufe Street and Riley Maury, the witness went out to hunt for Med. Snead, the constable. When he and Snead reached the grocery store they found it closed, and ascertained that Riley Maury and Rufe Street had

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taken defendant to the depot. They then went to the depot, where they found Riley and Street with the defendant. The witness then proposed to deliver the defendant to Constable Snead, but Street objected. Witness then left defendant in charge of Riley Maury, Rufe Street and Snead at the depot, and went off to put up the horses ridden by him and his party to Peterson's house. He then returned to the depot and remained there, with the others, until thirty minutes after nine o'clock, when the train arrived. He and his party, with defendant, boarded the train and went to Denton that night. While at the depot the witness saw the witness John Nichols. The conversation between witness and Nichols, detailed by Nichols in his testimony, was a purely imaginary one on the part of Mr. Nichols. Witness did not request Nichols to talk to defendant about the killing of Ferguson or about any other subject. He did not ask Nichols to advise defendant to confess to the killing of deceased, nor to frighten him by suggesting mob violence on reaching Denton.

On his cross examination the witness said that, while on the train, he remarked to the defendant that it might be better for him to make a statement, but he did not take the defendant into a water closet on the train, close the water closet door, and tell him that if he, defendant, would make a confession he, witness, would let him go back to Roanoke. Witness took the defendant to the water closet once between Roanoke and Denton, but did not himself go into the water closet, but stood at the door outside. Witness did not ask Rufe Street, while en route from Roanoke to Denton, to go through the train and try to find somebody to personate a detective and extort a confession from defendant. None of the parties, so far as the witness knew, were drunk on the day defendant was arrested. Witness and his party got at Roanoke the only whisky they had until they reached Denton that night. Witness drank no whisky between Roanoke and Peterson's house, and he did not see either Street or Riley take a drink. They took their first drink near old Elizabethtown on their return from Peterson's, and the second before they reached Roanoke. The defendant took a moderate drink on each of these occasions. The witness was at deceased's house on the Tuesday morning after the killing, and met old man Ferguson, who told him that he would pay him, witness, well to work up this case. From deceased's house witness went to the grave yard near Shiloh church, where Rufe

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Street was at work, and asked Street if he would go with him to investigate as to defendant's connection with the killing. Rufe asked in reply if there was "any money in it," but witness did not tell him of old man Ferguson's proposition to pay well for the work.

On re-examination this witness said that when he got to deceased's house he asked old man Ferguson if he had yet discovered any clues to the assassin. Mr. Ferguson replied that he had not, when witness told him that he had understood that Rufe Street met one of the Zwickers on the fatal evening, and that his, witness's, brother and two sisters on the same evening saw a tramp with a budget on his back, traveling towards the road that led from Bond's house to deceased's house, and that John Wakefield was said to have seen a similar tramp on the public road on the fatal evening. Witness also showed Mr. Ferguson a stick measure of some tracks he had seen in the road, and then insisted that Mr. Ferguson should send to Lewisville for Constable Gus Hall to trail the tramp. Mr. Ferguson replied that he was satisfied Hall was then in Denton, and asked witness to do the best he could in following up the supposed clues. Witness then said if he could he would get Rufe Street to go with him to identify the man he met on Sunday evening, and would then put Constable Snead of Roanoke on the case. Mr. Ferguson replied: "Do so, and I will pay you well for it." Defendant talked intelligible English, and the witness understood him without difficulty.

The testimony of the preceding witnesses Sparks, Fry, Boyd, Bacon, Griffith, Nichols and W. T. Maury, was delivered to the court in the retirement of the jury, as the predicate (contested by the defense) upon which the confession of the defendant was to be admitted or rejected—the defendant objecting to the confession that it was improperly induced while the defendant was drunk. The court held the predicate sufficient and, upon the return of the jury to the box, the witnesses Sparks and Boyd testified before them substantially as they did before the court.

Mrs. Ella Ferguson testified, for the State, that she was the widow of the deceased. Deceased died about two o'clock on the morning of January 2, 1888, from the effect of a gun shot wound he received about half-past seven o'clock on the night before. The witness was present when deceased received his death wound. He was lying on a couch in the northwest

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corner of the parlor of his house, his face looking east. The witness and her two daughters, Mr. Sarver, who had since married one of witness's said daughters, and old Mr. Zwicker, an uncle of the defendant, were in the parlor when the fatal shot was fired. That shot was fired through the bay window in the east end of the parlor, the half of one of the blinds to that window being open. The report of the gun confused the witness at first. When she recovered she saw the other parties kneeling over deceased, and the blood flowing freely from deceased's face. A doctor was sent for immediately. An organ stool stood in the room between the bay window and the couch on which deceased was lying. A buck shot struck that stool. One buck shot struck the hand of the deceased, and another entered his head at the ear. The last mentioned shot caused Mr. Ferguson's death about two o'clock on the next morning. Witness's oldest daughter, now Mrs. Sarver, was sitting near the deceased when the fatal shot was fired. Witness was sitting in the center of the room. Her youngest daughter was sitting near the organ. Mr. Sarver was sitting near the couch, and Mr. Zwicker, the uncle of defendant, was sitting near the bay window. Old man Zwicker had lived at the witness's house for several years. Otto Zwicker, defendant's brother, had once lived with deceased, but witness had never seen the defendant until she saw him in custody for killing the deceased.

Mrs. Ella Sarver, the daughter of the deceased and the preceding witness, testified, for the State, substantially as did her mother, adding that, besides the bullet holes mentioned by her mother, she saw others in the end of the couch and in the wall behind it. The shot broke the window and scattered glass over the room and set the window curtain on fire. Old Mr. Zwicker extinguished the burning curtains. The shooting occurred about half past seven o'clock on Sunday evening, January 1, 1888, when the family, as was its custom on Sundays, had assembled in the parlor. Witness's mother, at the time of the shooting, was reading aloud, and the others present were listening.

W. T. Maury, recalled by the State, testified that he heard of the killing on the day after it occurred. On the next morning, Tuesday, he went to Bond's house to learn from Bond, if he could, the exact hour when his, witness's, brother and sisters reached Bond's house on the preceding Sunday evening, and to ask Bond if a tramp applied at his house for food or lodging on

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that night. He found and measured a large foot track on the road leading north from Bond's house to the road running east by deceased's house. Witness went from Bond's house to the house of deceased, and thence to Rufe Street's house. He found a large track near Street's house, to which he applied the measure taken of the track near Bond's house, and found them to correspond exactly. He later, when en route to Peterson's house, found the same track on the road to Roanoke, at a point about three and a half miles distant from Rufe Street's house. Witness and his brother and Street arrested defendant at Peterson's house, near Elizabethtown. They first found him at the shop with a bucket of paint, wearing a shoe and a slipper. They took him to the field where his brother Otto was, and Street the second time identified the defendant as the man he met and talked with on the previous Sunday evening. Witness then had defendant remove the slipper, and closely examined that foot, but found no bruise on it. It did not show to be hurt at all. He then applied to the foot of Otto Zwicker the measure he had taken of the tracks before mentioned, and found it not to correspond. He then applied it to the feet of defendant, and found it to correspond perfectly. On getting back to Peterson's house the defendant went into said house and got his other shoe and changed hats. At Roanoke defendant removed his slipper and put on his shoe. When witness last saw defendant's coat and shoes they were in the jail at Denton. The shoes were of extraordinary size, being twelve or thirteen inches long. The track nearest Ferguson's house, measured by witness, was about a mile and a half distant.

On his cross examination, the witness denied the testimony of Rufe Street to the effect that he, Street, on Monday, in Kincaid's wagon yard in Denton, told him, witness, that he, Street, saw the defendant on Sunday evening near his, Street's, house. The first whisky drunk by witness, his brother Riley or Rufe Street on Tuesday was on their return from Peterson's to Roanoke. Witness and defendant took two small drinks between Peterson's and Roanoke. Defendant took another small drink in Roanoke, but if he took any more before being placed in jail, witness did not know it. He did not know how many drinks in all were taken by Street and Riley Maury. Witness denied that while at the depot at Roanoake he got defendant's shoe, took it out, and came back with a stick measure and remarked that the measure of the tracks he had taken

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corresponded with the shoe. He denied that, at the same time, he said that he had counted the nails in the shoe and found them to correspond with nail impressions in the tracks he had measured. Neither the witness nor defendant drank any whisky or other liquor after reaching Denton. Witness and deceased had a "little fuss" once in Louisville, but were on friendly terms when deceased was killed. Witness knew O. J. Massey, who lived south of deceased's place. Massey never offered witness his farm to kill Ferguson.

J. R. Maury, for the State, testified substantially as did his brother as to what transpired from the time they started to Peterson's house to arrest defendant, until defendant was placed in the Denton jail on the same night. He testified also that he made a separate measurement of the large shoe tracks in the road near Bond's house, near Street's house, and at a point about a mile and a half from deceased's house, being all of the tracks testified about by W. T. Maury except the one on the Roanoke road, which witness did not measure. The tracks measured by witness corresponded and looked to have been made by the same boot or shoe. Witness remembered seeing John Nichols at the depot in Roanoke. He said nothing to Nichols that night about having counted the tack impressions in the tracks measured by him in the morning. He did not leave the depot building with one of defendant's shoes and return with it and a stick measure, and tell Nichols or any body else that the shoe corresponded with the measure of the tracks and that the tacks in the heel and toe corresponded in number with the tack impressions in the tracks. Nichols did not, in the presence of witness, remove some mud from the heel of defendant's shoe, count the tacks, and say to witness: "Your tale won't do. Here are seven more tacks in the heel than you say were in the track." Witness knew O. J. Massey, who for a time was in partnership with deceased in the patent right business. Witness worked for them awhile in 1887, and during that year traveled in a buggy with Massey through Bowie county, Texas. While in Bowie county, Massey told witness that he would give witness all he owned to put deceased out of existence. Notwithstanding the proposition, witness continued to work for Massey until they got back to Denton, when he told deceased of Massey's proposition, quit work, and made affidavit of Massey's proposition before lawyer Copley.

T. E. Ball testified, for the State, that to his knowledge, de-

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Statement of the case.

fendant, on September 27, 1887, owned a number ten breach loading double barreled shot gun. T. A. Lee testified that on December 23, 1887, he delivered to the defendant a quantity of number ten cartridge caps which he, defendant, had previously ordered of him—witness being a merchant in Elizabethtown, Denton county.

J. G. Mars testified that, on the morning after the fatal night, he and one of the deputy sheriffs searched the coat of the defendant, and in one of the pockets found the part of a number ten shot gun cartridge hull now exhibited in evidence. Powder burn showed that it had been recently exploded. The said hull, when intact, could be loaded with any kind of shot.

Pat Street testified, for the State, that his brother Rufe came to his house early in the afternoon of the fatal Sunday, to bring a man whom the witness had hired to work on his place. Witness's shot gun was at his, witness's, house, all of the fatal night. The road from witness's house to Rufe Street's house passed by the house of John Wakefield.

Deputy County Clerk Zumwalt testified, for the State, that at the time deceased was assassinated a suit between the Zwickers and Peterson and the Fergusons was pending in the county court. Defendant was a party to that suit.

J. B. Walker testified, for the State, that his law firm was assisting in the prosecution of this case under employment of Mrs. Ferguson, the widow of deceased. O. J. Massey was in Denton a few days before this trial, but was now traveling in the patent right business. The State closed.

John Bacon was the defendant's first witness. He testified substantially as he did before the court during the retirement of the jury, adding that he did not see the defendant on the train; did not attempt to get defendant to confess, and saw nobody else make such an attempt. In his opinion Rufe Street was drunk on that night.

Gus Hall, constable of precinct No. 3 of Denton county, testified, for the defense, that he went to the house of the deceased on the night of the shooting, and soon after it occurred, remained an hour or two and then went to Roanoke. The moon rose on that night between eight and nine o'clock. At a point on the road between deceased's house and Roanoke, and about three miles from deceased's house, the witness, by the light of the moon, saw the tracks of a horse or horses which indicated that they were made by a horse or horses running, or at least

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traveling fast. From Roanoke witness went to Peterson's house, his purpose being to find the Zwickers—Otto in particular—with the view of discovering a clue to the assassin. He reached Peterson's about eight o'clock on the next morning. He found Peterson about the place, defendant at or near the paint shop, and Otto in the field about a mile off. He reported to them the assassination of Ferguson. Witness observed that one of the defendant's feet was very purple and apparently was severely bruised. He said that a wagon wheel fell on it on the previous Saturday. Witness could not say how defendant's foot looked on the next (Tuesday) morning. He did not get off his horse to examine the horse tracks he saw on the road. He last saw those tracks about a mile from Walnut Grove school house.

Rufus Street testified, for the defense, that he met and talked with defendant, as he testified for the State, on the evening of the fatal Sunday, but he did not then nor at any other time pay or promise to pay defendant fifty dollars, or any other sum, to kill Ferguson.

John Nichols was re-introduced by the defense and reiterated his testimony to the effect that, at the request of Bill Maury, he took the defendant into the corner of the depot at Roanoke on Tuesday night, and advised him to confess to the killing of Ferguson, as a means of securing lighter punishment, and avoiding attack by a mob, etc. One of the Maury boys took one of the defendant's shoes out of the depot, and on returning applied a measure to it. One of them also remarked that the number of tacks in the shoe corresponded with a specified number of tack impressions in the tracks he had measured. Thereupon witness removed some mud from the heel of one of defendant's shoes, counted the tacks and found them to outnumber by seven the number of impressions in the tracks as stated by Maury. Newt Graham was at the depot, drunk, and Rufe Street was there with a pint bottle of whisky, with which, he said, he arrested the defendant. Witness gave defendant a drink of whisky at the said depot on that night, and saw Graham give him another.

Cross examined, the witness said that he had often testified as a witness in criminal cases, and had himself been charged with criminal offenses. He was charged once with fighting, once with carrying a pistol, and twice with theft. Andy Peterson came to witness's house a short while before this

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trial, and talked some time with witness, but paid him no money. Witness testified on the previous trial of this case, but said nothing about Bill Maury getting him to attempt to extort a confession from defendant. He was not interrogated about that matter. The theft cases against witness, mentioned above, were dismissed and never tried.

Fred Peterson testified, for the defense, that he went to Elizabethtown on the evening of the fatal Sunday, and in going to that town passed by the place where defendant lived,—at Andy Peterson's. It was about three quarters of an hour before sundown when witness passed Andy Peterson's house. From a distance of about one hundred or one hundred and twenty yards, the witness saw the defendant standing near the paint shop with his foot resting on something. Within a moment or two the defendant limped into the shop. The evidence shows that Andy Peterson's house was several miles beyond both Roanake and Elizabethtown from deceased's house, and that Roanoke is sixteen miles distant from Elizabethtown. The defense closed.

To contradict the last witness, the State introduced Parker Terrell, who testified that he was at Andy Peterson's house about four o'clock on the evening of the fatal Sunday when Andy Peterson and Otto Zwicker reached that house with a small bunch of yearlings. No person came out of that house to open the gate for the yearlings, and witness while there saw no person other than Andy Peterson and Otto Zwicker.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Appellant was placed upon trial under an indictment for murder in the usual form. The jury returned into court this verdict: "We, the jury, find the defendant guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary for the period of his natural life." This verdict was received by the court, and the jury discharged.

Our Assistant Attorney General confesses error, because article 607 of the Penal Code provides that when a party is convicted of murder the jury *shall* specify in their verdict the degree of that offense of which they convict the defendant. This the verdict fails to do. That this is essential to a valid verdict

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in convictions for murder is too well settled to require citation of authorities. For this defect in the verdict the judgment must be reversed and the cause remanded for another trial.

But the Assistant Attorney General suggests the propriety of the court passing upon two questions presented by the record. First. The court charged the jury that "the defendant is presumed by the law to be innocent until his guilt is established by competent evidence to the satisfaction of the jury beyond a reasonable doubt, and if you have on your minds, arising from the evidence, a reasonable doubt as to the guilt of the defendant, you will find him not guilty."

Counsel for the defense objected to this charge upon two grounds: First. Because it requires either the State or the defendant to introduce affirmative evidence of defendant's innocence. Second. Because a reasonable doubt may arise from a want of evidence as well as from evidence introduced before the jury.

We have carefully examined the opinions of this court bearing upon this question, but find no judgments of reversal because of such a charge. The cases of Smith v. The State, 9 Texas Ct. App., 150; Blocker v. The State, Id., 279, and Wallace v. The State, Id., 299, were reversed because the charge required the jury to believe the accused innocent.

The case of Massey v. The State, 1 Texas Ct. App., 563, may be relied upon in support of the objections of appellant. In that case the court instructed the jury: "If you have a reasonable doubt as to the defendant's guilt, he is entitled to an acquittal; but it must be a reasonable doubt arising from and growing out of the evidence before you, and not an unreasonable doubt not growing out of the evidence." Upon this charge Presiding Judge Ector remarked: "A reasonable doubt, such as would entitle the defendant to an acquittal, need not necessarily arise out of the testimony; it may be the result of a want of testimony sufficient to satisfy the mind." The judge advises all trial judges, in their charges upon this subject, to follow the exact language of the statute and not to attempt any explanation. The judgment in that case was not reversed because of the charge commented upon. It will be seen that the charge given in the Massey case and the one under discussion are not alike in form or substance.

Back now to the first objection. This charge does not require the introduction of exculpatory evidence, nor is it calculated

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to impress the jury that the guilt of the accused is established beyond a reasonable doubt because there is no exculpatory evidence introduced before them. Nor does it, as was done in the cases referred to in 9 Texas Court of Appeals, place in the scales the guilt and innocence of the accused.

Second. It is true that a reasonable doubt may arise from a want of sufficient criminative facts to establish guilt, and it is contended that the jury may have construed the charge as requiring them to reach the conclusion that the accused was guilty beyond a reasonable doubt, because there was no evidence of innocence, when, in fact, the criminative facts were not sufficient—did not have such probative force. We do not think the charge calculated to have such effect.

A is placed on trial for murder; there is no evidence against him. The court instructs the jury that the defendant is presumed by the law to be innocent until his guilt is established by competent evidence to their satisfaction beyond a reasonable doubt. In this the jury are very clearly told that as defendant is presumed innocent, his guilt must be established—proved by competent evidence—evidence which establishes his guilt—criminative evidence. To what certainty? *To their satisfaction beyond a reasonable doubt.* Taking this charge as a whole, no one of ordinary sense could infer from it that he could reach the conclusion that defendant was guilty beyond a reasonable doubt, because there was no evidence of his innocence. We hold that the judgment should not be reversed because of the charge upon reasonable doubt, but would here again implore the trial judges to follow the words of the statute. (Code Crim. Proc., art. 727.)

The State introduced in evidence the confessions of appellant. There was proof that he had taken four or five drinks of whisky within six or eight hours before making the confessions. Counsel for appellant requested the court to instruct the jury "that if you find and believe from the evidence that defendant was so intoxicated at the time he made the confession as not to be able to understand what he was doing or saying, then you will not regard such confession as evidence against defendant." This was refused and exceptions were reserved. There is no proof that appellant was drunk at the time the confession was made, except inference drawn from the fact of his taking the four or five drinks above referred to. On the other hand, the testimony of the sheriff places this

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matter beyond debate—showing clearly that he was not drunk. There was no error in refusing the charge.

But let us suppose that the evidence presented a case in which there was doubt as to whether the accused was mentally capable of understanding what he was doing or saying, because of drunkenness, and that such a charge should be requested and refused, would this be error? We have not had the question before us, but the writer is of the opinion that it would be. But this question is not here decided.

Because the verdict does not specify the degree of murder found, as required by the statute, the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

Opinion delivered May 8, 1889.

No. 6399.

CHANCE KELLY *v.* THE STATE.

1. MURDER—MUTUAL COMBAT—CHARGE OF THE COURT.—The evidence in this case shows conclusively that the conflict was provoked and brought on by either the defendant or the deceased, and that the other, in resisting the attack, acted upon real or apparent necessity. *Held* that such proof excludes the idea of mutual combat, and in submitting that issue to the jury the charge of the trial court was erroneous.

2. SAME—SELF DEFENSE—CASE APPROVED.—Article 572 of the Penal Code provides that "homicide is justifiable in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article (murder, maiming, disfiguring or castration), and in such cases all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." In submitting this law to the jury, under the facts of this case, the trial court erred. See the opinion for a special charge on justifiable homicide, requested by the defense in lieu of the above charge, the refusal of which, in view of the proof, was error; and note the approval on this subject of Ormond's case, 24 Texas Ct. App., 496.

APPEAL from the District Court of Freestone. Tried below before T. J. Gibson, Esq., Special Judge.

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Statement of the case.

The indictment charged the appellant with the murder of Neil Washington, in Freestone county, Texas, on the twenty-fifth of December, 1887. The trial resulted in a conviction for manslaughter, a term of two years in the penitentiary being the penalty assessed.

Mack Washington, the brother of the deceased, testified, for the State, that the defendant, deceased and himself were among a large number of negroes who, on Christmas day, 1887, assembled at the house of Aaron Haines, in Freestone county, to partake of egg-nog. During the festivities the parties present got into a good natured scuffle, and a crowd led by the defendant attempted to expel from the house the crowd to which the witness and deceased belonged. The play was rough, but good humor apparently prevailed. After the scuffle defendant stepped out of the house and exclaimed two or three times that he would bet five dollars on his ability to throw down any of the parties present. He finally threw two dollars and a half on the gallery and repeated his challenge. Witness placed three dollars on the gallery and took up the half dollar placed there by defendant, and said: "My brother William can throw you down." Defendant took up his money and said: "I don't want to wrestle with William; Neil is the damned son-of-a-bitch I am after." Replying to this challenge, deceased said that he would not wrestle for five dollars, but would bet twenty-five dollars that he could throw the defendant. Defendant replied that he did not have that much money, but that he would borrow two dollars and a half from one of the boys, to make five dollars, which, together with his horse, he would bet to throw deceased. He then stepped off and led up his horse which he said he would entrust to William Washington, the brother of the deceased, to abide the result of the struggle. Before deceased could prepare himself for the wrestle, defendant ran up, seized him by the waist and exclaimed: "I can throw your damned ass to the ground every throw." About that time Boozie Kelly, defendant's brother, interfered, pushed the parties aside, and said: "Boys, don't fuss." Defendant then walked to the rear of deceased and without warning suddenly drew his knife, rushed upon deceased, exclaimed: "God damn your soul to hell!" reached over Boozy Kelly and stabbed deceased in the head. Deceased exclaimed: "Get out of the way; Chance is cutting me," and started to run, when defendant cut him again, in the arm. Deceased ran off, pursued by defendant a short distance.

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Statement of the case.

Defendant soon returned to the crowd, but deceased did not come back. Defendant pulled his knife, opened it and put it in his pocket open, when he started after his horse. The deceased had no knife in his hand at any time during the scuffle or difficulty, so far as the witness saw or knew, nor did he, so far as the witness knew, cut the defendant. Deceased was cut in three places—twice in the arm and once in the head.

James Grant and Austin Gaines were the other witnesses for the State. Their account of the transaction differed, immaterially however, as to details of the wager, from that of the first witness, but they concurred in the statement that about the time the parties were apparently about ready to wrestle, the defendant, without warning, rushed upon deceased with an open knife and cut him twice. They also concurred in the statement that defendant opened his knife, and put it into his pocket open at or before the moment he delivered the horse to William Washington.

Tom Haines was the first witness for the defense. He described the friendly scuffle in the house about as the witnesses for the State had done, and then testified that, after the scuffle, and when the parties had gone outside of the house, Ed Haines offered to bet two dollars and a half that defendant could throw any man in the crowd. Deceased said, speaking to defendant: "By God, you can't throw me down for fifty dollars." Defendant said: "Bud, we were not talking to you, but I can throw you down for thirty dollars. I will put up my horse for twenty-five dollars; I have two dollars and a half, and will borrow two and a half from Ed., and that will make thirty dollars. that I will bet I can throw you down." Defendant then brought his horse from a fence near by, and put the reins in William Washington's hands. The two men then approached each other, when deceased said to defendant: "God d—n you, you won't do anything you say you can do." Defendant replied: "Well, I can throw you down." Deceased said: "You are a God d—n liar; you will do nothing you say you will do." About that time Boozie Kelly got between the disputants and said: "Boys, wrestle if you are going to, but don't get mad." Defendant replied to Boozie: "I am not mad, but I can throw him down." Deceased reiterated: "You are a God d—n liar," etc., thrust his hand into his pocket, drew and opened his knife, advanced and slashed at the defendant over Boozie's shoulder, and cut defendant in the neck. At that time Boozie was push-

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ing defendant back, when defendant said to him: "Turn me loose, Booz.; don't you see that God d—n nigger cutting me with his knife?" Defendant jerked loose from Boozie, thrust his hand in his pocket and drew his knife. Just as he got it open witness slapped it out of his hand. He stooped and picked it up, and as he was straightening up the deceased rushed at him with his knife in a striking position, and defendant struck with his knife as deceased came on him, cutting deceased in the temple, and on the arm. Defendant at no time advanced upon deceased, nor did he at any time curse deceased or call him a damned son of a bitch, or say that he, deceased, was the damned son of a bitch he was after. He did not draw his knife until after deceased cut him on the neck.

Boozie Kelly, Primus Grant and Chaney Hillery, witnesses for the defense, testified substantially as did the witness Tom Haines. Two or more witnesses testified to threats against the defendant uttered by deceased at various times prior to the difficulty.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. It was excepted to the charge of the court to the jury that the instructions contained therein with regard to mutual combat were uncalled for by any evidence in the case, and were calculated to confuse and mislead the jury. "From the facts we think it clear that one or the other of the parties provoked or brought on the conflict, and that the one or the other not chargeable with this acted upon real or apparent necessity; and this excludes the idea of a mutual combat." (Roseborough v. The State, 21 Texas Ct. App., 672.) There was no proposition to nor understanding between the parties that they were to fight. On the contrary, the proposition and understanding was that they were to wrestle for a sum of money, or upon a bet as to which could throw the other down. In preparing for this contest one or the other got mad, drew his knife and assaulted the other with it. The evidence is conflicting as to which party commenced the fight. During the fight both parties were cut with a knife. Under the facts of the case it was error to charge the law of mutual combat.

As to defendant's right of self defense, the court instructed

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the jury in the language of article 572, of the Penal Code, which requires a resort to all other means to prevent the threatened injury, before there is a resort to homicide, in order to render it justifiable. This instruction was excepted to, and defendant's counsel requested a special instruction in lieu thereof, as follows: "If you believe from the testimony in the case that there was an unlawful attack made upon defendant by deceased, and that the attack was of such a nature that the defendant had reasonable grounds to believe that he was in immediate and impending danger of being murdered or of receiving serious bodily injury by his assailant, he is justifiable in killing his assailant when (if?) at the time of the killing some act has been done by the deceased showing evidently an intention to commit one of such offenses; and the defendant in such case may act promptly, without resorting to other means before killing his assailant, because in such case the law presumes the party's safety depends upon his prompt action in killing his assailant; and if you so believe from the evidence you will find the defendant not guilty;" which instruction the court refused to give. The instruction was correct as a proposition of law, was in our opinion applicable to the facts in evidence, and should have been given as part of the law of the case. (Penal Code, art. 570; Willson's Crim. Stats., sec. 970.)

According to the testimony of defendant's witnesses, he was first assaulted by deceased and was cut upon the neck with a knife before he drew and used his knife, and that deceased was still assaulting him when he, defendant, inflicted the cuts upon deceased with his knife. Under the facts it was error to charge the rule of law announced in article 572 of the Penal Code. (Ormand v. The State, 24 Texas Ct. App., 496.)

For errors in the charge of the court, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered May 8, 1889.

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No. 6428

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WILLIAM KING v. THE STATE.

FORGERY.—INDICTMENT.—If the written instrument declared upon as a forgery is so incomplete in form as not to import a legal liability, then, to sufficiently charge forgery upon it, the indictment must allege such facts as will invest it with legal force and show that, if genuine, it would create a legal liability. See the opinion for an indictment *held* insufficient to charge forgery because, in the absence of innuendo averments, the indictment declared upon is incomplete in form and substance, and does not import a legal liability.

APPEAL from the District Court of Hill. Tried below before the Hon. J. M. Hall.

The opinion discloses the case. The penalty assessed by the jury was a term of two years in the penitentiary.

S. C. Upshaw, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. As set forth in the indictment the offense was charged in the following language, viz: "That William King did, in the county of Hill, and State of Texas, on or about the first day of December, A. D. 1888, then and there wilfully, knowingly and fraudulently attempt to pass as true, to H. R. Smith, a forged instrument in writing to the tenor following:

'Weighed on Fairbanks Standard Scale, Dec. 1st, 1888.
Load of one load of corn,
From Sam Simpson
To Patty & Brockington.
On gross 2513 lbs.
Off tare 1011 lbs.

Fees net, 1502 lbs.
Net bus. Weigher' (space for figuring on back side);

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which said instrument purported to be the certificate for said Sam Simpson of one load of corn weighed on said scales for the account and benefit of Patty & Brockington, and which said instrument, if true, would have created a pecuniary obligation on said Patty & Brockington to pay to the legal owner and holder thereof for 1502 pounds of corn; which said instrument in writing the said William King then and there knew to be forged, and did then and there attempt to pass the same as true with intent to injure and defraud; contrary to law and against the peace and dignity of the State."

A motion was made to quash the indictment, which was overruled by the court. The Assistant Attorney General confesses error and admits that "upon the face of the indictment the instrument (declared on) does not create any liability upon the part of any one to be responsible for anything. 2. There are no innuendo averments showing the facts or reasons why the said instrument created such liability, nor are there requisite explanations set out that make the alleged forged instrument a forged instrument in law."

"If a writing is so incomplete in form as to leave an apparent uncertainty in law whether it is valid or not, a simple charge of forging it fraudulently, etc., does not show an offense, but the indictment must set out such extrinsic facts as will enable the court to see that, if it were genuine, it would be valid." (2 Bish. Crim. L., 7 ed., sec. 545.) And "when an instrument is incomplete on its face, so that, as it stands, it can not be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force." (1 Whart. Crim. Law, 8 ed., sec. 740; and see the subject fully discussed in Hendricks v. The State, 26 Texas Ct. App., 179; see also Anderson v. The State, 20 Texas Ct. App., 595; Rollins v. The State, 22 Texas Ct. App., 548; State v. Wheeler, 19 Minn., 98; same case, 1 Green's Cr. L. Repts., 541.)

We are of opinion the motion to quash the indictment should have been sustained, and that the court erred in overruling it. The judgment of the court below is reversed, and because the indictment is fatally defective in setting out the offense attempted to be charged, the prosecution thereunder is dismissed.

Reversed and dismissed.

Opinion delivered May 8, 1889.

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No. 6181.

JOHN DAILEY v. THE STATE.

1. PLAYING CARDS, ETC.—INFORMATION.—A "gin" is not one of the places or houses designated by the statute as a "public place." To charge the offense of playing cards in a public place, "to wit, a gin," the information should have charged the facts which constituted the gin a public place.
2. SAME—FACT CASE.—The information charged that the accused played the cards in Starkey's gin. The proof was that he played cards in a fence corner, in a pasture and in a room near Starkey's gin, but not at the gin. *Held*, insufficient to support a conviction.

APPEAL from the District Court of San Saba. Tried below before the Hon. A. W. Moursund

The opinion discloses the nature of the case.

The penalty assessed against the appellant was a fine of ten dollars.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is not supported by the evidence in the record. Defendant is charged in the indictment with playing cards at a public place, to wit, at Starkey's gin. It was not proved that he played cards at said gin.

Furthermore, the indictment is bad. A gin is not one of the places or houses designated by the statute as *public*; wherefore it was necessary to allege in the indictment the facts which made it a public place. (Tummins v. The State, 18 Texas Ct. App., 12.)

The judgment is reversed and the prosecution is dismissed.

Reversed and dismissed.

Opinion delivered May 11, 1889.

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Statement of the case.

No. 6483.

WILLIAM GREEN *v.* THE STATE.

THEFT—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction for theft because it not only fails to establish a fraudulent taking of the alleged stolen property, but shows that it was taken under a mistake of fact and claim of right.

APPEAL from the County Court of Brown. Tried below before the Hon. R. P. Conner, County Judge.

The conviction in this case was for the theft of a pair of blankets, the alleged property of S. R. Switzer, in Brown county, Texas, on the first day of December, 1888. The penalty assessed against the appellant was a fine of ten dollars, and confinement in the county jail for twenty-four hours.

S. R. Switzer was the first witness for the State. He testified that he lived in Comanche county, Texas. Witness went to Brownwood, in Brown county, about the last day of November, 1888, traveling in a wagon in which he carried certain bed clothes, including the blankets mentioned in the indictment. They were gray blankets with a black border, worth about three dollars. On reaching Brownwood the witness "put up" at J. T. Triplett's wagon yard. Early that night he informed Mr. Triplett that he was going to spend the night with some friends in town, and asked if he had a place about the wagon yard where he could safely store his bedding for the night. Mr. Triplett indicated a certain house in the wagon yard as a safe place. Witness put his bedding, including the said blankets, in that house, and told Mr. Triplett that if any of his, Triplett's, customers should need more cover than they had, they could use his. Witness then went off. When he returned to the wagon yard between nine and ten o'clock on the next morning, he missed his said blankets from the house in which he had put them. He then asked Triplett if they were used the night before by any of his, Triplett's, friends or customers. Triplett replied that they were not, and, when witness told him that the blankets were gone, he said that some parties from McCulloch county had just left the yard, and that perhaps they had taken

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the blankets through mistake. Witness and Triplett then went up town and found the parties from McCulloch county, but they did not have the blankets. Soon afterwards Triplett met a man on the street whom witness did not know, and asked him if he knew anything about the blankets. The man replied that he did not, but that Bill Green, the defendant, on the night before got a pair of blankets from the harness house in the wagon yard of Triplett, and asked him to take them home for him, and that the said blankets would be found on his wagon rolled up with his bedding. Witness and Triplett then went to that man's wagon and found the blankets. The said blankets were taken without the consent of the witness. Witness did not know a Mr. Wainscot, and could not say that the man from whose wagon the blankets were recovered was named Wainscot.

J. T. Triplett, on his examination in chief by the State, testified substantially as did the witness Switzer. On his cross examination he said that he had known the defendant for eight or ten years. Defendant very frequently "put up" at witness's wagon yard, and often remained there for several days at a time. He went into and out of the houses on the premises at will, and came and went off frequently without saying anything to witness. The harness house in the yard was kept open for the accommodation of customers, to store and take out their property when and as they wished. Frank Allison often kept horses in the wagon yard, as long as ten days at a time, and came and left at will, sometimes without saying anything to witness. Witness and defendant never had a conversation about Switzer's blankets until about two weeks before this trial, when defendant said that he thought he was taking some blankets that belonged to Allison, and which Allison told him he could have if he would get them.

On re-examination, the witness said that if Allison ever left any blankets in the said wagon yard he never knew it. He thought he would have seen such blankets had they been left there by Allison. Defendant never asked witness about blankets left in the yard or harness house by Allison, nor did he ever say anything to witness about the Allison blankets until, as stated, about two weeks before this trial. Frank Allison, during the fair in October, 1888, claimed that he lost a pair of blankets.

J. E. Wainscot testified, for the State, that he and Mr. Ross

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Statement of the case.

went to Brownwood in a wagon and "put up" at Triplett's wagon yard. They met defendant and Bob Parnock in town after supper, and remained with them until bed time, when defendant went with witness to the wagon yard and proposed to sleep with him. Witness said something about being "short of cover," when the defendant said he had a pair of blankets on the counter in the harness house. Witness told him to get them. He went to the harness house and returned with a pair of blankets, which were spread on witness's bed, and he and defendant went to sleep. Witness got up early next morning and said something about a drink. Defendant said he would furnish the quarter of a dollar if witness would go after a half pint of whisky. Witness went to town and, after waiting some time for a saloon to open, bought the whisky and went back to the wagon yard. Defendant was not yet up. Witness finally told him that he wanted to put up his bedding, and to get up and take a drink. After defendant got up witness asked him what to do with his blankets. He replied: "Roll them up with yours and take them home for me." Witness rolled them up with his bed clothes, and went up town. Between nine and ten o'clock he met Triplett, who told him that a Mr. Switzer had lost a pair of blankets from the yard, and asked if witness knew anything about them. Witness replied that he did not, and told him about the blankets in his wagon which were claimed by the defendant, and that he could look at and take those blankets if they were the ones he was hunting. A few evenings after this John Hulse came to witness's house and said that defendant had sent him for the blankets. Witness told him to tell defendant that Triplett took the blankets from the wagon as the property of another person. Witness and defendant often met after the blanket transaction and before this indictment was found, but they never spoke about the blankets. It was dark when witness and defendant went to bed on the night of the alleged theft, and it was before day when witness put up his bedding. He could not, therefore, describe the blankets except that they were of a gray color.

John Hulse testified, for the State, that, early in December, 1888, he was at the defendant's house. He left that house with the intention of returning, and when he started the defendant asked him to come by Wainscot's house and get a pair of blankets for him. On his return to defendant's house, witness told him that Wainscot said that the blankets were taken

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from him by Joe Triplett as the property of another man. Defendant said: "Joe Triplett ought not to have taken those blankets, for they are blankets that Frank Allison gave me." Witness asked him: "Can't you be mistaken in the blankets?" Defendant replied: "Well, there may be something in that."

John Triplett, one of the proprietors of the Triplett wagon yard in Brownwood, testified, for the State, in substance, that he was at the yard when the defendant and Switzer "put up" at the wagon yard. Switzer put his bedding in the northwest corner of the harness house, and not on the counter in that house. Defendant, after his indictment for the theft of Switzer's blankets, told witness that he got the blankets off the counter. Allison never said anything to witness about leaving such blankets in the harness house until after the defendant was indicted. The witness saw no blankets other than Switzer's in the harness house on that night.

The State closed.

Frank Allison testified, for the defense, that, late in November, 1888, he went to Brownwood and put up at Triplett's wagon yard. He took a pair of gray blankets, with a dark border, to that yard, tied behind his saddle. When he left he forgot his blankets, leaving them at the wagon yard. A few days later witness started to Arizona, expecting to remain there. He told defendant that if he would get the blankets from the wagon yard he could have them. After his return from Arizona witness got the blankets and a saddle from defendant.

On his cross examination, this witness said that he never called on either of the Tripletts for the blankets he left at the wagon yard. Witness knew nothing whatever about the taking of Switzer's blankets.

Charles Boyd testified, for the defense, that he went to Brownwood with defendant on or about December 1, 1888. At Triplett's wagon yard, on that day, defendant showed the witness a pair of gray, dark bordered blankets that he said were left at said yard by Frank Allison, and given to him by the said Allison. Witness did not see the defendant when he got those blankets.

John E. Bell, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It is shown by the evidence that defendant explained his possession of the blankets by the statement

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that one Allison had given them to him, and had authorized him to get them from the place from which he took them. He proved that Allison had such a pair of blankets at the place, and that Allison told him if he would get them he might have them. Allison's blankets were similar in all respects to those taken by the defendant. These facts are not disproved or controverted by the State's evidence. Defendant took the blankets openly, without any concealment or effort to conceal the taking. He took them under a claim of ownership.

We think the evidence shows that the taking was not fraudulent, but was under a mistake of fact, and does not, therefore, sustain the conviction. The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered May 11, 1889.

No. 6282.

THOMAS ASTON *v.* THE STATE.

FAILING TO MAKE REPORT REQUIRED BY LAW—CONSTITUTIONALITY OF A STATUTE.—Article 756 of the Penal Code provides that any person is guilty of an offense who, being engaged in the slaughter and sale of animals for market, shall fail to report to the commissioners court of the county in which he transacts his business, at each regular term thereof, the number, color, age, sex, marks and brands of all animals slaughtered by him, together with a bill of sale, or written conveyance to him for every animal slaughtered by him, save such as were raised by himself, etc. Article 754 of the Penal Code provides that any person is guilty of an offense who, being engaged in the slaughter of animals, shall kill or cause to be killed any unmarked or unbranded animal for market, or shall purchase and kill or cause to be killed, any animal without having taken a bill of sale or written transfer of the same from the person selling the same. To a prosecution under article 756, the defendant pleaded the unconstitutionality of the said article upon the ground that to require him to make such report would be to require him to give evidence that could be used against him in a prosecution under article 754; wherefore the said article 756 is in contravention of section 10 of the Bill of Rights. *Held*, that the defense is untenable, and that the said article 756 is constitutional.

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Opinion of the court.

APPEAL from the County Court of Cooke. Tried below before the Hon. J. E. Hayworth, County Judge.

This conviction was for violation of article 756 of the Penal Code, the appellant being prosecuted for failing to report to the commissioners court the animals slaughtered by him for market. The penalty assessed by the verdict was a fine of fifty dollars.

H. L. Stuart and *Stuart & Baily,* for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for the offense denounced by article 756 of the Penal Code, that is, for failing to make a report to the commissioners court of animals slaughtered, etc. Counsel for defendant insists that said article compels a person engaged in slaughtering cattle to give evidence against himself, and is therefore in violation of section 10 of the Bill of Rights.

We are unable to perceive the application of said section to said article. Said section relates to the rights of *accused* persons, being prosecuted and on trial for crime. "In all criminal prosecutions, the accused shall not be compelled to give evidence against himself." Article 756 did not compel defendant in this prosecution to give evidence against himself. It required of him to make a certain written report, which he failed to make. His defense for not making said report is that, if he made it, he would be making evidence which might be used against him in a prosecution under article 754 of the Penal Code, and to compel him to make such report would be to compel him to give evidence against himself in such prosecution.

This is not a prosecution under article 754. He was not accused of violating article 754 at the time he should have made the report required by article 756. He was not an *accused* person at the time he failed to make said report, and if he had then made the report he would not have given evidence against himself in a prosecution then pending against him. If article 756 is invalid upon the ground urged, then the statutes which require public officers to make certain reports are for the same reason void, because such reports might be used in evidence against them in prosecutions for various offenses. It seems to us that to sanction the proposition of counsel for defendant

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would be stretching section 10 of the Bill of Rights beyond reason, and giving to it an interpretation and effect not intended or even imagined by the framers of that instrument. We are settled in our conviction that it has no such meaning, and that article 756 is constitutional and valid. The motion for rehearing is overruled.

Affirmed and motion overruled.

Opinion delivered May 11, 1889.

No. 6277.

JOHN STONE *v.* THE STATE.

THEFT.—EVIDENCE.—See the opinion for the substance of evidence *held* insufficient to support a conviction for theft of hogs, because it proves neither the venue of the offense nor the alleged ownership of the property.

APPEAL from the District Court of Llano. Tried below before the Hon. A. W. Moursund.

This conviction was for theft of hogs of value less than twenty dollars. The penalty assessed by the verdict was a fine of sixty-nine dollars and sixteen cents, and confinement in the county jail for nine days.

The opinion sufficiently discloses the case.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for the theft of three hogs alleged to be the property of one Barber. As presented to us in the statement of facts, the evidence does not sustain the conviction. There is no sufficient proof of the venue of the offense. Barber testified that he lived in Llano county, and owned a stock of hogs; that he missed some of his hogs from their range; but he did not state where that range was, whether in Llano or some other county. No witnesses testified

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Statement of the case.

that the hogs were taken in Llano county, nor was it proved circumstantially that they were taken in that county.

Three hogs were found in defendant's possession, which one witness testified bore the ear mark of Barber, and had flesh marks similar to hogs which Barber had missed from his hog range. There is no other evidence that Barber owned the hogs found in defendant's possession. In rebuttal, defendant proved that the three hogs found in his possession were in his own mark, and were his hogs; that his mark was almost identical with Barber's, and that other persons in the county used the same mark that Barber used.

We are of the opinion that the allegation of ownership is not sustained by the evidence. The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered May 11, 1889.

No. 6279.

S. R. WILSON v. THE STATE.

THEFT—FACT CASE—CHARGE OF THE COURT.—See the statement of the case for evidence *held* insufficient to support a conviction for theft, because insufficient to establish a fraudulent taking of the property; and note the same for a requested instruction to the jury, the refusal of which, under the evidence adduced, was error.

APPEAL from the District Court of Llano. Tried below before the Hon. A. W. Moursund.

The indictment charged the appellant with the theft of rails of the value of five dollars, and lumber of the value of eighteen dollars. The conviction was for theft of the rails, and the penalty assessed against the appellant was a fine of twenty dollars and confinement in the county jail for twenty-four hours.

William McMichael was the first witness for the State. He testified that, during the year 1887, he lived on the premises known as the Conner place, in Llano county, which he rented

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Statement of the case.

from John C. Oatman. Defendant occupied that place during the year 1886. Some time in November, 1887, the witness missed a number of fence rails from the cow pen at the said Conner place. The large majority of those rails were old and rotten, but among them were about seventy sound rails, worth about seventy cents. Witness did not see the rails taken, and did not know who took them. He did not miss the rails until, suffering loss from the depredations of hogs on his potato crop, he hunted for the place in the fence through which the hogs got into the field. The rails removed from the cow pen formed that part of the pen that connected with the field. The said cow pen had been at that place a long time prior to 1886. The witness knew nothing about defendant repairing the said cow pen in 1886.

M. T. Dixon testified, for the State, that, in September, 1887, he saw Simon Elliott and a boy hauling away from the Conner place some rails, a door and about two hundred and fifty feet of lumber, which lumber, he thought, was worth about ten dollars.

Dan Johnson testified, for the State, that he and Simon Elliott, some time in December, 1887, took a load of lumber from an old house on the Conner place to the defendant's place, and piled it near a haystack with other old lumber. Defendant was not at home at that time, and said nothing then, nor at any other time, to witness about hauling said lumber to his place. Witness was then in the employ of the defendant, but did any work required of him by Simon Elliott. About a month before hauling the said lumber, the witness and said Elliott hauled about one hundred and twenty rails from the cow pen on the Conner place to defendant's place. Defendant was present when the rails were taken, and helped load the same on the wagon. At this point the State announced that it would limit the prosecution to the charge of stealing the rails only.

Powell Reeves testified, for the State, that in November, 1887, he assisted Simon Elliott and Dan Johnson to haul some old rails from an old cow pen on the Conner place to the place of the defendant. Not more than sixty of the rails were sound. The others were rotten, and were taken to be used as firewood. Defendant was present and put a few of the rails on the wagon, and told witness, Elliott and Johnson, when they had loaded enough. In the year 1886, the witness helped other parties haul about two hundred and fifty rails from the defendant's home

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Statement of the case.

place to the Conner place, then occupied by defendant, which said rails were used by defendant in repairing the said old cow pen on the Conner place.

John Warden testified, for the State, that, in the fall of 1887, he saw some parties hauling some old rails away from the old cow pen on the Conner place. Defendant was present, and the parties loading the rails on the wagon were in the employ of the defendant. The State closed.

Tom Williamson was the first witness introduced by the defense. He testified that he was a tenant of the defendant on the Conner place in 1886. The cow pen attached to that part of the Conner place occupied by defendant was in a dilapidated condition, and he, Simon Elliott and Powell Reeves, hauled about two hundred and fifty rails from the defendant's home place, which said rails belonged to defendant. Those rails were used to repair the said cow pen.

Simon Elliott testified, for the defense, that he lived now and for several years had lived with the defendant. Defendant had the Conner place leased in 1886, on which place Tom Williamson, then in defendant's employ, lived. The old cow pen on the place was in a very dilapidated condition, and to repair the same for use the witness, Reeves and Williamson hauled about two hundred and fifty rails from defendant's home place to the said pen. About one hundred and fifty of those rails were used to repair the cow pen. When moving the defendant's pasture fence to join to the Conner field fence in the fall of 1887, the witness and others hauled about one hundred and twenty-five or thirty rails from the said cow pen. They did not get as many as were put on the cow pen. While the said rails were being hauled on the wagon, defendant rode up and said that enough rails had been taken.

John C. Oatman testified that, as agent, he rented the Conner place to defendant in 1886. Defendant's lease expired December 31, 1886, when McMichael rented the place and went into, and still was in possession of it. Witness did not authorize defendant to remove any rails from the old cow pen on the said place.

The requested charge, refused by the court and referred to in the headnote and opinion, reads as follows: "The defendant requests the court to charge the jury that rails placed on land and in a fence, if put there for a temporary purpose, remain the property of the person placing them there, and he can take

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Syllabus.

them away at his pleasure. In this case, if you believe from the evidence that the rails were originally Wilson's and that defendant, S. R. Wilson, or his workmen, placed the rails alleged in the indictment to have been stolen, on the place from which they were removed, for a temporary purpose, the said rails remained the property of Wilson, and it would not be theft for him to take them away; and if you so believe you will acquit defendant."

No brief for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. There is not sufficient evidence in the record that the defendant took the rails with fraudulent intent. He took them openly, in the day time, in the presence of witnesses, and made no effort to conceal the taking. There is evidence tending to show that the rails taken belonged to him, or that he believed they belonged to him, and a special charge presenting this phase of the case was requested by the defendant and refused by the court, and the defendant excepted and reserved his bill. We think the charge should have been given, because it is a part of the law of the case, and was not embraced in the charge given to the jury.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered May 11, 1889.

No. 6378.

LEM MANN *v.* THE STATE.

BURGLARY—EVIDENCE.—Two of the articles taken from the burglarized house are described in the indictment as a "Canadian quarter of a dollar coin and a Mexican quarter of a dollar coin." Two such coins were produced in evidence by the State, and the court admitted the testimony of an officer that they looked like coins he got from unknown parties after the arrest of defendant; that he did not know from whom he got them, and that he did not get them, nor coins like them, from defendant. *Held* that this evidence in no way traced the said coins to the possession of defendant, and was erroneously admitted.

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Statement of the case.

APPEAL from the District Court of Brown. Tried below before the Hon. J. W. Timmins.

The conviction was for burglary, and the penalty assessed by the verdict was a term of two years in the penitentiary.

S. J. Dowty was the first witness for the State. He testified, in substance, that he lived in the town of Brownwood, Brown county, Texas, in which town he followed the business of a retail liquor dealer, his drinking establishment being known as the Little Elephant saloon. He had known the defendant two or three years, during which period the defendant, at different times, had been in his employment. The witness's bar tender was sick on the night of July 20, 1888, in consequence of which the witness was on watch that night. The defendant came into the witness's saloon about ten o'clock on that night, and called for a small glass of beer, to cost five cents, tendering a dollar in payment. Witness said to him: "Damn it, give me some small change." He replied that the dollar was all the money he had, and that he was going that night to either Coleman or Ballinger—the witness could not now say which. Witness closed his saloon between eleven and twelve o'clock that night, and went home, seeing no more of defendant. He opened his saloon quite early on the next morning, observing nothing unusual until he discovered that the catch of the cash drawer was not in place. His first impression was that he had left the cash drawer open when he left on the night before. Closer inspection, however, showed that the drawer had been pried open and the lock broken. Witness then examined the contents of the drawer, and from a glass kept in that drawer as a separate place of deposit for odd coins, he missed seven peculiar coins, consisting of two Mexican quarter dollars, two Canadian quarter dollars, two Mexican half dollars—one being of the new and one of the old issue—and one old worn American half dollar of the coinage of 1834. This latter had a hole in it. One each of the Mexican and Canadian quarters was much worn—the Mexican quarter particularly on one side. One each of the Mexican and Canadian quarters was comparatively new, though the letters "n" and "t" in the word "cents" on the new Canadian quarter were very dim. The Mexican half dollar and the Mexican quarter and Canadian quarter now in evidence, if not the same, were exact counterparts of similar coins taken from the witness's money drawer, but witness

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could not positively identify them as the same. Such coins as those taken from witness's drawer were very scarce. The witness also missed from his saloon one of the only two pint picnic whisky flasks that he had in his saloon. A demijohn which contained "Anderson county" whisky, and which was kept at a particular place under the counter, and which was at that particular place when witness closed his saloon on the previous night, was moved to another place near by. After examining the front part of the saloon, the witness went to the rear end and found the back window raised and the perpendicular iron bars pried far enough apart to admit the passage of a man's body. The stick with which the bars were pried apart, and which bore the marks of the bars, was found on the ground, outside of the house, and immediately under the window. The said saloon was entered in the night time, without the knowledge or consent of the witness, in Brown county, Texas, on July 20, 1888.

On his cross examination, the witness said that he did not know who entered his said saloon on the said night and took the said coins and whisky flask. The last time he saw the defendant on that night was when he came into the saloon as stated and called for a glass of beer. He then said that he was going to Coleman or Ballinger on the passenger train that night. Witness understood him to say that the dollar he tendered in payment of the glass of beer was the only money he had, but he may possibly have said that it was the smallest change he had. Picnic flasks similar to that taken from witness's saloon were in common use, and were generally kept in stock by retail liquor dealers.

Ollie Phillips testified, for the State, that he was bar tender at the Little Elephant saloon, in Brownwood, at the time of the burglary in July, 1888. The witness had often seen and handled the coins said to have been taken from the cash drawer of that saloon at the time of the burglary. He described them as did the witness Dowty. The witness closely observed the Canadian coins, because for a time he designed having them made into cuff buttons, and did not because, one being worn and the other intact, they did not match well. The coins now exhibited to witness were coins exactly similar to those taken from the Little Elephant saloon at the time of the burglary, the letters "n" and "t" in the word "cents" on the Canadian quarter showing dimly, as they did on the Canadian quarter that was

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taken. No person had the consent of the witness to enter that saloon on that night. The witness was sick and was not at the saloon on the night of the burglary, and could not say at what time the saloon was closed. Witness could not positively identify the coins in evidence as those taken, but they were identical in appearance.

R. H. Jeffries testified, for the State, that, about eleven o'clock on the night of the burglary, defendant came into his saloon in Brownwood and took a drink and went out. Witness did not see him again on that night. It was nothing unusual to see the defendant on the streets of Brownwood at eleven o'clock at night.

Bud Smith testified, for the State, that between eleven and twelve o'clock on the night of the burglary he saw the defendant sitting in front of The Office saloon, in Brownwood. After sitting there a while, defendant passed around the corner of said saloon and went toward the rear of the Little Elephant saloon. Witness saw him no more that night.

On cross examination, this witness said that it was not unusual for defendant to be on the streets of Brownwood at eleven o'clock at night. A public street passed the rear end of the Little Elephant saloon, and defendant was traveling that road when witness last saw him that night.

D. G. Lindsey testified, for the State, that he lived in Brownwood and had known defendant for several years. He went to the rear of the Little Elephant saloon on the morning after the burglary, and examined the window through which the burglar entered the house. The perpendicular bars were pried far enough apart to admit the passage of a man's body, and on the ground under the said window lay a stick, which, from marks on it, showed to be the instrument used in pressing the bars apart. Witness also saw foot tracks under and about the window, and on the outside and the inside of the fence at a point near the road where the burglar evidently crossed the said fence. He recognized those tracks as the tracks of the defendant. He recognized them from the fact that, having suffered frequent loss by theft, and suspecting the defendant as the thief, he had often examined tracks made by him, and by that means became familiar with them. At that time the defendant was wearing a shoe, the sole of which showed to be worn on one side, and the tracks about the window and fence of the Little Elephant saloon showed to have been made by such a shoe. A

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small quantity of dirt was found on the window sill, and on the fence, which dirt was evidently left there by the burglar in his passage into or out of the yard and house. On his cross examination the witness said that he would not absolutely swear that the said tracks were made by defendant, but, speaking upon belief and knowledge of his track he was satisfied that they were.

Nat Royall testified, for the State, that he slept at the depot of the Gulf, Colorado and Santa Fe Railway on the night of the burglary. Some time after the passenger train passed, bound for Coleman, the defendant awakened witness and asked him to take a drink. He then handed witness a pint picnic flask, from which the witness took a drink of whisky which tasted to him like the "Anderson County" whisky sold over the bar at the Little Elephant saloon. Defendant then left and witness saw him no more on that night. On his cross examination the witness said that he would not undertake to say that the drink of whisky given him by the defendant on the said night was a part of the whisky kept in stock at the Little Elephant saloon. It tasted like it. Witness did not know whether or not other saloons sold the same kind of whisky.

W. Harrison testified, for the State, that he was in business in the town of Coleman, in July, 1888. About eight o'clock on the morning of July 21, 1888,—the morning after the alleged burglary,—the defendant came into witness's store and made a small purchase, handing him in payment an old worn American half dollar with a hole in it. Witness declined to receive the coin for more than thirty-five cents, and. defendant refusing to pass it at that valuation, took it back. Witness never afterwards saw that particular half dollar.

J. C. Jones testified, for the State, that he lived in Coleman, and was deputy sheriff of Coleman county at the time of the burglary of the Little Elephant saloon in Brownwood. Witness received a telephone early on the morning after the burglary, from Brownwood, directing him to arrest defendant. He found the defendant going out of the back door of a saloon with a pitcher of beer in his hands, and arrested him. Defendant asked to be permitted to take the pitcher of beer to a cabin and deliver it to a party who had sent him for it. Witness accompanied him to the cabin, and defendant delivered the beer to a negro woman. The woman asked him, "where is the change." Defendant offered her a Canadian quarter, which

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the woman at first declined to take, but finally accepted. Witness then jailed defendant. Witness soon received another telephone to look for certain peculiar coins, such as one described in the indictment. The Mexican half dollar, the Mexican quarter and the Canadian quarter now exhibited to witness are similar in every respect to coins obtained by witness and delivered by him to Sheriff Perry of Brown county. He got the Mexican half dollar from C. N. McFarland, but he could not say from whom he got either the Mexican or Canadian quarter. He did not, however, get either of the coins in evidence from defendant, nor did he get from defendant any coins like those in evidence.

C. N. McFarland testified, for the State, that he lived in the town of Coleman, where he kept a general store. Defendant came into his store early on the morning after the burglary in Brownwood, and bought a can of something for his breakfast, and in payment of the said purchase handed the witness a silver coin, witness giving him change. Witness was quite busy on that morning and paid no further attention to the said coin than to note its denomination. Later in the day deputy sheriff Jones came to witness's store and asked witness if he received any money from defendant on that morning. Witness replied in the affirmative and took from his pocket the money he had taken in on that morning. Among the ten or a dozen coins taken in, the witness found a Mexican half which he did not observe when paid to him. He gave that coin to Mr. Jones in exchange for an American half. Had he noticed said coin was Mexican money when he received it, the witness would not have taken it at the value of fifty cents. Witness could not undertake to say that the said half dollar was paid him by the defendant, nor could he now say that the coin paid him by defendant was a half dollar piece.

The State closed.

The defense moved the court at this time to strike out the testimony of J. C. Jones as to the Mexican and Canadian quarters, and that of McFarland as to the half dollar, upon the ground that the State had failed to connect the defendant with the said coins. The court overruled the motion, and the defense introduced an agreement with the State, as follows: "It is agreed that N. B. Fisk, if here, would swear that on the evening of the burglary he paid the defendant some money, and that among other coins there was a Mexican quarter and a

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Mexican half dollar, and he believes that on an evening or two before he paid defendant a Canadian quarter."

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. That portion of the testimony of the witness J. C. Jones relating to the Canadian quarter of a dollar coin, and a Mexican quarter of a dollar coin, which he obtained from unknown parties, was irrelevant, said coins in no manner being traced to the defendant, and the court erred in refusing to exclude said testimony upon the motion of the defendant. Under the facts of this case, this illegal evidence may have influenced the verdict of the jury to the prejudice of the defendant; and because it was improperly permitted to go to the jury, the judgment is reversed and the cause is remanded. Other testimony objected to by the defendant was relevant and properly admitted.

Reversed and remanded.

Opinion delivered May 15, 1889.

No. 6347.

FRANK WOODS *v.* THE STATE.

1. PRACTICE—VENUE.—The record in this case failing to show that the venue of the offense was proved as alleged, the conviction must be set aside.
2. SAME—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.—See the opinion for a charge of the court upon the law of circumstantial evidence *held* erroneous, and in view of the defendant's exception, cause for reversal. In lieu of the said erroneous charge, the accused asked a special charge on the subject, in the usual form, which the trial court refused. *Held*, error.
3. SAME—WANTON AND MALICIOUS KILLING OF A HORSE.—See the statement of the case for a special charge of the court requested by the defense which, in view of the proof, was erroneously refused.

APPEAL from the County Court of Clay. Tried below before the Hon. B. F. Turner, County Judge.

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Statement of the case.

This conviction was for wantonly killing a horse, and the penalty assessed was a fine of forty dollars.

J. B. Young testified, for the State, in substance, that he owned the horse mentioned in the information. He bought that animal from John Burson in August, 1887, at which time the horse was nearly two years old. Witness thought the animal was a gelding, but did not throw him down to verify that opinion. After keeping the animal in a pasture for about two months, the witness turned him on the range on Buffalo creek, near Red Lake. Witness missed him from the range about a week before he was killed. About an hour before sun down, on Thursday evening, April 26, 1888, witness went to defendant's house, hunting his said animal. Defendant said that, on that day, he saw the animal at a certain point about three-quarters of a mile east of his house, and that if witness would go to that place he would find him. Witness replied that if the animal was at the point indicated by defendant it was all right. He then rode off in a north direction, and at a point about a quarter of a mile distant from defendant's house he found his said horse lying under a cottonwood tree. He had been recently castrated, had bled profusely, and was not quite dead. Witness followed a trail of blood from the point where the horse was lying to a point within fifty yards of where he had seen defendant standing a few minutes before, and within twenty or thirty steps of the lot near which the defendant then had a horse staked on the prairie. Witness then told defendant about the condition in which he found his horse, when the defendant proposed to help witness get the animal in his shed and doctor him. On the next day witness went back to defendant's house and told defendant that he wanted pay for his horse. Defendant denied that he had anything to do with the cutting of the animal, or that he knew anything about it, and refused to pay witness, or to admit any claim against him. The horse was not dead when witness demanded pay of the defendant, but died during the night.

Mr. Ferguson testified, for the State, that Young's horse died from the effects of imperfect castration on Friday night. Witness saw that animal with his mares on the preceding Sunday and on Tuesday morning. Witness next saw Young's horse, dead, about a quarter of a mile from defendant's house. Afterward defendant told witness that Colonel Young had passed him, refusing to speak to him, and that if he and Colonel

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Statement of the case.

Young could get together they could settle the horse matter. The witness thereupon went to see Colonel Young, and he and Young went to defendant's house to see defendant. Young stopped about fifty yards from the house, and witness went to the house, but found that defendant was not at home. He told defendant's wife that Colonel Young was outside, and had come to see what defendant would do about the horse matter. Mrs. Woods replied that defendant had left word for Colonel Young to leave his proposition in writing. Witness reported to Colonel Young, who, with an oath, said he had no proposition to write, but wanted pay for his horse. Witness had never observed that Colonel Young's said horse was a stallion.

Mr. Elkins testified, for the State, that defendant came to his house on the morning of Thursday, April 26, 1888, inquiring for the owner of a stray stallion, which, he said, was bothering his mares. He said that he was breeding his said mares to a stallion of his own, and wanted to get rid of the said stray horse, whose colts he did not want. Witness told him that Colonel Young owned a horse corresponding with the description given by him, and that Mr. Shipman owned one a little darker in color. Defendant left, saying that he was going to ride until he found the owner of that horse.

Mr. Carpenter testified, for the State, that the defendant came to his house on the morning of Monday, April 26, 1888, hunting the owner of a stray stallion which, he said, was bothering his mares. He said also that he was breeding his said mares to his own stallion, and wanted the stray animal taken up. Witness told him that he, too, had mares that were being interfered with by a stray stallion, and that he would like to be rid of him. Defendant replied: "Don't the moon shine? The moon, for some purposes, gives a better light than the sun."

James Burson testified, for the State, that he sold the horse mentioned in the indictment to Colonel Young in August, 1887, at which time the said animal was two years old, less one month. The witness then thought the animal was a gelding. He was the foal of a mare that belonged to witness's sister. He strayed off when about a year old. He was not castrated when he went off, but when recovered, shortly before witness sold him to Young, he had scars about his testicles which led witness to believe he had been castrated. Witness did not critically examine him and could not say positively that he was castrated when bought by Colonel Young.

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The State closed.

Mrs. Woods, the defendant's wife, testified, in behalf of the defendant, that defendant owned a stallion to which he was breeding his mares. One morning in April, 1888, the defendant said that a stray stallion was bothering his mares, and that he was going to hunt for the owner to have him taken up. After the defendant came back and went to plowing Colonel Young rode up to the fence, talked with defendant and rode off. He soon came back and went to where the defendant was staking his horse, talked to defendant a few minutes and then left. Next morning Colonel Young came back to the house and demanded that defendant should pay him for the horse, which the defendant refused to do, declaring that he had no hand or part in injuring the horse. No such horse was castrated on the defendant's lot—of that fact the witness, who helped defendant with his stock, was certain. On the day before defendant went to look for the owner of the stray stallion, and on which Colonel Young first came to defendant's house about the horse, the witness saw two men driving three horses past her house towards the cottonwood tree in the hollow, under which Colonel Young was said to have subsequently found his injured horse. Witness did not know either of those men, nor did she, to her knowledge, ever see Colonel Young's said horse.

The special charge of the court referred to in the last head note reads as follows: "If you (the jury) believe from the evidence that the defendant did injure the horse, and if you further believe that it reasonably appeared to defendant that his stock was in danger of serious injury from said horse, and that he inflicted the wound upon the horse to prevent such injury, you will find him not guilty."

J. A. Templeton, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. In this case the Assistant Attorney General confesses error, there being no proof of venue in the record.

In view of another trial, it is proper that we should say that the court's charge upon circumstantial evidence went too far in instructing the jury that "if the facts and circumstances in

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evidence could not be accounted for upon any reasonable grounds consistently with the innocence of defendant, and were such as to establish the guilt of the defendant with a degree of certainty to satisfy the mind of a man of ordinary understanding, and so to convince him that he would act upon that conviction," etc., they would convict the defendant. Defendant excepted to this instruction and requested a correct charge upon circumstantial evidence, which was refused, and he excepted; and his exception is, we think, well taken.

Charge number two requested by defendant and refused by the court was a part of the law of the case not embraced in the court's charge, and it was error to refuse it.

Because of the errors named, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered March 15, 1889.

No. 6379.

J. P. LYNN *v.* THE STATE.

PRACTICE—PLAYING CARDS, ETC.—EVIDENCE.—The information charges that the accused, on March 5, 1888, did play a game of cards in a certain out house, "said out house being then and there a place where people did then and there resort." To authorize a conviction under this information it was necessary for the State to show by the evidence that the offense was committed prior to the presentation of the information, and that at the very time it was committed the said out house was a place where people resorted. See the opinion for the substance of evidence *held* insufficient to support a conviction for playing cards in a place of public resort.

APPEAL from the County Court of Coleman. Tried below before the Hon. J. T. Evans, County Judge.

The opinion discloses the nature of the case.

The penalty assessed against the appellant was a fine of ten dollars.

Woodward & Vining, for the appellant.

W. L. Davidson, Assistant Attorney General for the State.

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Syllabus.

WILLSON, JUDGE. This conviction is not supported by the evidence. It was not proved that the defendant committed the offense at a date prior to the presentment of the indictment. (Temple v. The State, 15 Texas Ct. App., 304.) It was not sufficiently proved that at the time the defendant played cards in the out house it was a place where people resorted. A witness testified that he had seen persons play cards in said out house one time prior to the time that the defendant played there, but did not state the time. It may have been so long prior as to have no bearing whatever in fixing the character of the place at the time defendant played there.

It was necessary that the State should prove that at the time defendant played in the out house it was *then* a place of resort; that is, a place where people were in the habit of going for gaming or other purposes. (The State v. Norton, 19 Texas, 102; Wheelock v. The State, 15 Texas, 260.)

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered May 15, 1889.

No. 6502.

EX PARTE GEORGE AND JOHN HANSON.

HABEAS CORPUS.—FACT CASE.—The relators were charged jointly by indictment with the murder of J. D. Munn, in Navarro county, Texas, on the sixth day of November, 1888. They sued out jointly a writ of habeas corpus for allowance of bail. Upon the hearing of the writ bail was awarded the relator John Hanson in the sum of three thousand dollars, and was denied to the relator George Hanson. This appeal is jointly prosecuted by the relator John Hanson to secure reduction of the bail allowed below, and George Hanson for an allowance of bail. Upon the evidence adduced on the hearing (for the substance of which, see the statement of the case), the judgment is affirmed as to John Hanson, and reversed as to George Hanson with an award of bail in the sum of five thousand dollars

HABEAS CORPUS on appeal from the District Court of Navarro. Tried below before the Hon. Rufus Hardy.

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Statement of the case.

The syllabus states the nature of the case.

C. J. Hanson was the first witness for the relators. He testified that he was the father of the relators, who were brothers. The relators lived with the witness on his place in Navarro county, between the towns of Corsicana and Purdon. Witness's residence was situtated about one hundred yards from the Corsicana and Waco wagon road, known as the "cow-head" road. Munn lived in a house situated on the opposite side of the said road, about one hundred and fifty yards from it, and about three quarters of a mile distant from witness's house, toward Corsicana. In going from witness's house one would pass Munn's house, and in going from Munn's house to Purdon, traveling the said road, one would pass witness's house. When going to Purdon in a vehicle Munn always traveled the road *via* witness's house, but when he traveled to Purdon on horse back he generally went the shorter route through Slaughter's field. Witness's cotton patch was in the back part of his field, between eight hundred and a thousand yards distant from the house.

Munn was killed on the evening of November 6, 1888,—the day of the presidential election. Munn and the witness were enemies at that time, and had been for a year, but there had never been a personal difficulty between Munn and either of the relators. Witness and Munn had a personal collision in Corsicana, about three weeks before, in the course of which Munn knocked the witness down with an ax handle, slipping up behind witness to do so. The witness was picking cotton in his cotton patch on the morning of the fatal day, and saw Munn when he passed the field on that morning in company with his friends, Thweatt and Simpson, going towards Purdon. One of those men left some election tickets at witness's house. About an hour later the witness hitched his horse to his buggy and went to Purdon to attend the election and vote. He went by the house of old man Barnes, and got Barnes to go with him as a sort of guard. He found the relators at Purdon attending the election. After remaining in Purdon an hour or two, the witness and the relators went home to dinner. After dinner witness proposed to go to picking cotton. George excused himself upon the ground that he did not feel well, and the witness and his daughters, Hattie and Cora, went to the patch and picked cotton until near sundown. Just before quitting work the witness heard the relator George, coming to the field with his dog, which was barking.

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Statement of the case.

When George passed, the witness and his daughters stopped picking, weighed their cotton and started for the house, the girls about one hundred yards in advance of witness. Witness had gone but a short distance when he heard loud talking. He turned to look in the direction whence it proceeded, and that instant heard the report and saw the flash of a shot fired from a pistol in the hands of Munn. This shot was followed by two others so close together that the witness could barely tell they were separate shots. John, who had been answering a call of nature, got up, and started to walk, but fell, his pants dangling about his legs, and witness thought that Munn had killed both of his boys.

At the time the shooting occurred the witness was standing on a small hill about two hundred and fifty yards from the house, and about two hundred and fifty yards from the point where Munn fired the shot. Munn had then passed, and had gone about four hundred yards from witness's house. The place where the shooting occurred was on lower ground than that on which witness stood. Corn stalks and weeds intervened between the two points; and witness did not see either of his boys when the shots were fired. He did not see Munn until he turned at the sound of the voices, and Munn fired the first shot from his pistol just as the witness caught sight of him. Munn was traveling east, and the witness was going west, just before the shooting. Witness distinctly saw Munn, who was on a mule. Witness did not see George at all, nor John until he got up from where he was squatted as before stated. When John fell down, the witness thought he had been shot. He, witness, then ran to his house to get his gun, but finding it empty left it, telling his daughters to go to Major Hanson's house, and ask him to come to his, witness's, house. Witness then started back to the field where the shooting occurred, and met the relators. To his question, "what is the matter?" George answered: "Munn and I have exchanged shots, and I made a narrow escape. Here (indicating his coat) is where he plugged me." Witness replied: "Go at once and surrender to an officer." He, George, went at once to the house, mounted his horse and rode rapidly to Major Hanson's house, reaching there about the time the girls did. Major Hanson returned with George, and the latter proceeded at once to prepare his things to go to Corsicana to surrender. John employed himself fixing his pistol while George was gone to Major Han-

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son's. A crowd gathered about the time that George got back from Major Hanson's. George took his gun with him to the field on the fatal evening, for the purpose of shooting some cows that were in the habit of breaking in upon the crops. He had previously shot them with bird shot, but had told witness that, as the bird shot had not kept them out, he had determined to try them with larger shot. He took his dog with him. When he saw George coming to the field, with his gun and dog, witness said to his son Frank, who was with him: "Run and see if the cows are in the field, and if they are drive them out or George will shoot them."

George and John must have gone due north on leaving the house, and thence through the cotton patch, then around the pasture, and thence up the pasture fence to the Corsicana and Waco road. They took that route to avoid the difficult walk through the stubble in the field. Munn could have saved a full quarter of a mile by going through Slaughter's field. George had on his coat when he got on his horse to go to Major Hanson's, and that coat then had a bullet hole in it. John fixed his pistol during George's absence, discharged one shot, and remarked that he would risk it firing. Neither of the relators went to Munn's body with the crowd. After making some preparations and eating supper George got a crowd together and went with them, or rather got them to go with him, to Corsicana to surrender. Witness went to the place where Munn's body was, but did not see the body, as it was dark. A small fire and a lantern were burning at the said place. Adams, Aderholt, Slaughter and others were there. The weeds flanking the Corsicana and Waco road on either side were called blood weeds, and in places were over ten feet high. They stood dense in some places and sparse in others. George was living with witness at the time. John, who was a married man, had sent a part of his household effects to Ellis county, whither he was moving, and at that time the balance of his effects were loaded in a wagon, which was standing in witness's yard to be sent forward on the morrow.

Cross examined, the witness said that the point in his field from which he saw the first shot fired by Munn was about two hundred and fifty yards from his house, and perhaps not more than two hundred yards from the Corsicana road. He had come five or six hundred yards from the cotton patch towards his house at that time. The shooting occurred about an hour

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Statement of the case.

before sundown. Four shots in all were distinguished by the witness, and they sounded very much alike. The gun used by George was a small breech loader. It belonged to the witness, who also owned another just like it, and a third one which was a muzzle loader. The ravine did not cross the road at the point where the shooting occurred, nor was there "much of a valley" at that point. John had no gun, but had a rope or bridle in his hand. He did not see Munn fall. The mule he was riding was capering about from the time the first shot was fired, as long as witness could see it. Witness could hear Munn talking much better than he could see him. Witness saw the flash of George's gun, but did not see George himself at the time of the shooting.

On his re-examination the witness said that he considered the place at which the killing occurred unfavorable as an ambush. There was a ravine accessible to the road, about fifty yards from where the killing occurred, into which either or both the relators could have gone, and have been completely hidden from the view of a person on the road. The place in the road from which George fired, and the place in the field where John was at that time, were open and clear. From the place in the road where George fired he could see up and down the road at least one hundred and fifty yards each way. The witness's field fence along that road was a straight fence, partly rail and partly wire.

The relator John Hanson testified that for some time before, and until a day or two preceding the evening of the killing, he lived on the Howard place, about a mile distant from the house of his father, the preceding witness. Witness had dispatched some of his household goods to Ellis county, whither he intended moving on November 7, 1888, and had the balance of his effects packed in a wagon ready to go forward. He saw Munn, Thweatt and Simpson on their way to Purdon on the fatal day. Purdon was about three miles distant from witness's father's house. Witness and his brother went to Purdon soon afterwards, arriving there about 9 o'clock. They remained about the polls at Purdon for perhaps three hours, when they went back to their father's to dinner. About an hour before sunset the witness and his brother left their father's house and went to the field to see if the cows were again depredating on the crops. They went through the cotton patch to the pasture, and thence up the pasture fence to the road. Leaving the house

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they went north by the road through the field, which took them directly away from the main Corsicana road. They pursued that route five or six hundred yards, out of sight of the said Corsicana road, and then went east down a small branch, over which they could not see the road. They then went up the pasture fence to get a bridle that witness had left hanging on the fence at a point near the gap. That gap was about two hundred yards from the main Corsicana road. Witness got the bridle, and when he and his brother reached the fence near the road, the witness had a call of nature, to relieve which he squatted down in the field, and George crossed the fence to the road. While relieving himself the witness heard Munn cursing George. Among other things he said; "Oh yes, I've got you now where I want you. I tried to do up your father with an axe handle, and I will try you with something else." George was then sitting on the bank of a small ditch on the road side, and could see up and down the road a distance of one hundred and fifty or two hundred yards. Munn then fired two shots at George, and George seized his gun, which was lying on the ground near him, and shot at Munn. The sun was about thirty minutes high when the shooting occurred. Munn could have passed along that road without being seen by parties in the said field. Witness had no pistol or other weapon at the time of the shooting. Neither he nor his brother had ever had any trouble with Munn. Their father had a difficulty with him some time before the killing. George took the gun with him on the fatal evening for the purpose of shooting cows which he expected to find depredating on his crops.

On his cross examination, the witness said that the first intimation he had of Munn's proximity at the time of the shooting was the cursing of George by Munn. The witness was then inside the field, twenty or thirty feet distant from Munn and George, who were on the outside. He did not see either Munn or George until he stood up, which was a moment or two before Munn fired. Four shots were fired. The first two were fired by Munn immediately after he began cursing. George seized his gun and took it up from the ground between the two shots fired by Munn. There were no trees, bushes nor weeds at the place of the shooting. George crossed the fence into the field immediately after the shooting, and he and witness went home, meeting their father about two hundred yards from the house. Munn fell off his mule; that animal, which

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Statement of the case.

had been fretting, went off toward home. Witness, with J. J. Adams and Rowton, accompanied George to Corsicana on that night.

The relators closed.

S. M. Rowton was the first witness for the State. He testified that, at the time of the killing of Munn, he was at Aderholt's house, about a quarter of a mile from the point where the killing occurred. He heard the shots fired at the time of the killing. The first two were loud reports. After a brief interval two more shots were fired, making fainter reports than the first two, and after a somewhat longer interval the fifth and last shot was fired. The first four shots sounded like guns, and the last like a pistol. The witness had just reached Aderholt's house from Purdon. He and Munn traveled from Purdon together to the head of a lane, near which the killing took place. They parted at the head of the said lane, witness going to Aderholt's via Slaughter's place. The killing occurred a very short time after their separation. Some time after the shooting Henry Hanson, a cousin of the relators, came to Aderholt's after witness, and witness, with Aderholt, J. J. Adams and Freeman, returned with him to Munn's body,—Henry Hanson and said Adams having previously been there. Munn's body was lying slightly quartering across the road in or near a slight depression in the road. A pistol lay on the ground, pointing straight from Munn's head. Witness saw another pistol on Munn's person. While the several parties named by the witness were at the body, C. J. Hanson, the father of the relators, appeared and said: "There seems to be a little excitement here." He, C. J. Hanson, then pointed to the pistol lying on the ground, and asked if any person present knew that pistol. Witness saw the relators in Purdon on that day, and at their father's house after the shooting, and went to Corsicana with George on that night. Witness and his crowd were the first to reach Munn's body that night.

E. A. Slaughter testified, for the State, that he was at home sick at the time of the killing of Munn. Between sun down and dark on that evening the witness heard five shots. There was a slight interval between the second and third shots, and a somewhat longer interval between the fourth and fifth. The first two shots were the loudest. The second two shots were fired from a breech loading gun. About an hour after he heard the shots the witness was informed by his son of Munn's

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death, his said son telling him that he had passed Munn's dead body on the road. Witness was not familiar with Munn's reputation as a law abiding or law breaking man. He had known Munn since 1880; during which time he was on neighborly but not intimate terms with him, and recognized him as a good neighbor and a good citizen. There was a ravine in the witness's field which ran up to the fence near the place where the killing was said to have occurred. There was another small ravine in Hanson's field opposite, that ran out of the field under the fence, and then turned suddenly back into Hanson's pasture, making an elbow immediately under the fence. There was a third ravine between witness's house and the place where Munn was killed.

On his cross examination, the witness stated that he was unable to swear to Munn's reputation as a fighting man. He had heard of Munn having trouble with Wright, with Berry and and with the Hansons, but he never heard Munn threaten the Hansons. He also heard that Munn was arrested once for aiding others in a fight with one Ward. He also heard of a party once cursing Munn on a race course, and that Munn went home, got his gun and went back to the track. The witness was familiar with the use of fire arms, and from a distance could tell the difference between the report of a breech loading and that of a muzzle loading gun.

Describing the wounds found on the body of Munn, Doctor W. A. Bates testified as follows: "I found altogether fourteen wounds on Munn's body. Probably some of the missiles made each two holes. There were wounds in the right temple, running down and backwards, two scalp wounds, one wound on the back of the neck, one on the left thumb, one on the right side under the arm, one in the right arm that ranged through, two on the back that ranged up to and under the shoulder blade, and one on the right hip. The said wounds were mostly on the right side. I don't think the wounds in the temple and scalp could have been made by the same discharge. They must have been from separate shots. I judged from the appearance of the wounds that the wounds on the scalp were made with a pistol ball. The shots in the body all ranged upward. and the temple wounds went straight through. Thirteen shot struck. I counted fourteen wounds from thirteen shots,—two glancing. I took no shot out of the body. Dr. Gillian had been to see him before and probed the wounds. I looked at the ground where

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Statement of the case.

Munn was killed from my horse, and did not get down. Dick Thweatt and Lon Cox were there with me. There were tracks in a ditch close by, but inside of a field. There were weeds on the roadside, but I did not notice whether they were sufficiently dense to shield a man. The wounds in the temple produced instant death. The wound in the loin would have resulted in death, but not instantly."

On cross examination the witness said: "Going west the tracks in the ditch would have been to the right. The shots in the body ranged up. There is doubt about the direction shot will take after entering the body. We often read of one striking the skull and going around the head. The range of the probe in the temple wounds would have been from the right ear to the rear of the left. I did not probe them. The scalp wounds made abrasions of the skin only. They struck the head in front and were at right angles to the wounds in the temple. It does not take a professional to determine the place at which a ball entered a body. It always leaves a larger and a ragged hole at the point of exit."

Cloud Slaughter testified, for the State, that he was at the pasture gate between the houses of his father and Freeman when the killing of Munn took place. He heard five shots, the balls or shot of which went to the right of witness,—witness being about 580 yards distant from the place where Munn was killed. The first two shots were very loud ones; the other three not so loud. Ten or fifteen minutes after the first shots were fired the witness heard a pistol shot fired at or near Hanson's house. He then heard women crying. About an hour afterwards he heard of Munn's death. Including the pistol shot, witness heard six reports.

C. C. Aderholt testified, for the State, that while he was at his supper table on the evening of November 6, 1888, he heard five shots, with slight intervals between the second and third and the fourth and fifth. The first two were louder than the second and third, which in turn were louder than the fifth. To the witness the shots sounded like gun and not like pistol shots. Some of the boys came into the house just after the shots were fired and remarked: "We are having fun soon after the election." Within the next thirty minutes the witness heard of the killing of Munn. Henry Hanson called witness to his gate and said to him: "We want you; George Hanson has killed Jim Munn." Witness replied: "Certainly not!" Henry re-

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plied: "Oh yes, he has; and I want you to go and see about it." By this time the witness's family had congregated at the gate. Witness asked Henry Hanson: "How do you know Munn is dead?" He replied: "J. J. Adams and I have been there, and he is dead." Witness then went with a party of gentlemen, including Henry Hanson, to Munn's body. He found the body lying in the road at the point where the shooting occurred. A small five shooting pistol, with two barrels discharged, was lying on the ground, about two and a half feet from the head, the muzzle pointing towards the head. Dr. Gillian was then sent for and soon arrived. He opened two jackets that were on the body, and inside the jacket next to the skin he found a full loaded large pistol. While the parties were examining the body C. J. Hanson, the father of the relators, appeared on the scene, and remarked, as he stopped some distance from the body: "Hie! You have some excitement here. There is a pistol; who does it belong to? Do any of you know that pistol?" He then added: "George wants to give up, and wants some of you to go to town with him." Before witness went to Munn's body Henry Hanson said to him: "The girls came to my house and said that Munn was dead. George said: 'I killed Munn. Now don't ask me any questions.'" There was a ravine near the place of the killing and thick weeds not far from it. Munn's mule was shot through the nose and neck on the left side, with what witness took to be large squirrel shot.

Eugene Slaughter testified, for the State, that he was at his father's house at the time of the killing. Before good dark the witness, being in the lot, heard five shots; short intervals elapsed between the second and third, and the fourth and fifth shots. Witness could tell, at a distance, the difference between shots fired from a gun and those fired from a pistol. He thought the said five shots were fired from guns. The Slaughter pasture gate was nearer the place of the killing than was the lot in which the witness was standing when he heard the shots.

Doctor Gillian testified, for the State, that he examined the wounds on Munn's body, probing those in the right temple and the back. The range of the balls which inflicted those wounds was back and upwards. The body when witness first saw it was lying in the road, the back towards Hanson's house. A five shooting pistol was lying on the ground near the body, but witness did not examine it. The wounds in the temple were

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fatal; they entered and ranged at right angles to the scalp wounds. The wounds in the back appeared to have been inflicted with squirrel shot. The shot or balls that entered the temple penetrated the base of the brain.

S. M. Patterson testified, for the State, that he heard of the killing of Munn on the morning after it occurred, and went to the place where it occurred to examine the ground. He found foot tracks in a "little sink" just inside Hanson's field. High weeds were growing along the line of Hanson's field fence, but not immediately in front of the point where he saw the said tracks. A person traveling the road just outside the field could not see a party sitting down at the point where the witness saw the tracks. From that point the tracks led through the fence into the road near the point where Munn fell. Witness found no tracks on the side of the road opposite Hanson's field, nor in the opposite field. Witness saw two pistols at Munn's house, one of which was said to have been taken from Munn's body, and the other to have been found on the ground. Witness also saw Munn's mule on that morning. It was shot through the nose and neck on the left side. Witness was familiar with the nature of a mule, and knew that a mule, when stricken on the side of the head, would turn around.

Cross examined, the witness said that Howard, Bell and others were with him when he examined the ground at the place of the tragedy. A plain impression on the ground at the "sink" or ravine showed where a man had sat, there being also foot prints in the bottom of the ravine. The said ravine was a "washed out place." The ground was bare at that point, and there was nothing between it and the fence. There were two impressions of a man's feet in the ditch or ravine, but witness found no foot prints leading to them. There was but a single track between those impressions and the fence, and there were two or three in the road outside of the fence. Witness had been told that various parties visited that place on the night of and after the killing.

D. W. Hill testified, for the State, that he examined the ground in the vicinity of the killing on the morning after it occurred. In the small ravine described by the witness Patterson the witness saw the impression of a knee and a foot. He observed tall weeds growing along the line of the fence. C. J. Hanson's house was in sight of the place of the killing. Witness observed the wounds in the neck and nose of Munn's

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Statement of the case.

mule, and thought they were inflicted with number three buck shot. Howard and others were with the witness. Howard testified, for the State, substantially as this witness did.

Joe Hodges testified, for the State, substantially as Howard and Hill did, and stated in addition that the foot tracks in the ravine showed that the person standing there faced the road. Witness was in his field, about three quarters of a mile distant, when the fatal shots were fired. He heard five shots, which he took to be reports from shot guns, the two first being the loudest. After the lapse of some time he heard the fainter report of a weapon fired at or near Hanson's house.

R. J. Anderson testified, for the State, that he was at Mrs. Curry's house, about a mile and a half distant from the place of the killing, on the evening of November 6, 1888. He heard five shots, all of which in his opinion were from shot guns—the first two, which were the loudest, being fired from a muzzle loader, and the remaining three from a breech loader.

William Farmer testified, for the State, that he was on his way to Bob Farmer's house at the time of the killing. Before he reached the said house he met Latch Dew and Mr. Withrow, who told him of the killing of Munn, and asked witness to go with them to the body. The witness went as requested. He found Munn's body lying in the road, with one leg somewhat doubled under the body. Witness turned the body over and straightened it, and in doing so he saw a pistol in the coat or vest pocket. He examined that pistol and found it to be loaded all around. He saw another pistol on the ground near the body. He examined that pistol also, and found it to be a five shooter with two or three of the chambers empty. The hammer was resting on an empty shell. The empty chambers were all cankered, indicating that the pistol had not been recently discharged. Witness placed the two said pistols back in the same places where he found them. Aderholt took the two said pistols to Munn's house, where they were placed in a trunk. Witness left Munn's body about ten o'clock that night. It was then "misting," and quite a shower of rain fell afterward.

Latch Dew testified, for the State, that he was at his home, about a mile and a half from the place of the killing, at the time it occurred. He heard the shooting, but paid only enough attention to it to note that the first two were the loudest of the shots. He afterward went to the body, and near it found a forty-four calibre five shooting pistol. He examined that pis-

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Statement of the case.

tol, and believed it to be the same pistol which one Lancaster showed him about five months before. He would not, however, swear that it was the same. He did not examine the pistol for marks, though Lancaster, when he showed his pistol to witness, said that he had put marks on it. Witness never saw either of the relators in possession of the Lancaster pistol. According to the recollection of the witness, the pistol he found on the ground near the body had three empty chambers.

James Belt testified, for the State, that he saw the relators at the election in Purdon on the day of the killing. He did not see them engage in a private chat, but during the day he saw George call John, and saw the two go off together. He did not know where they went. On the next morning the witness made a partial examination of the ground about the place of the killing. The weeds to the right of the place in the ravine where a person had made foot tracks were higher than a man's head. The tracks leading from the gully to the place where Munn fell showed that the party stumbled in getting out of the gully.

Rolley Dew testified, for the State, that he saw both of the relators on the day of the election in November, 1888, and saw the relator John Hanson on the day of the inquest. We did not observe the shoes worn by either of the relators on either of those days. He had never heard either of the relators utter any positive threats against Munn, but, about the time the Hansons were charged with stealing some wine, George said to witness: "You have heard about this wine trouble? Well, Munn got me into it, and if he swears on the witness stand that I got the wine, he and I can no longer live in the same neighborhood and do well." The witness knew as a matter of fact that George Hanson frequently, if not habitually, carried his double barreled shot gun before the killing and before the wine trouble. He carried it stock hunting and "sparking the girls." Witness saw George, John and Henry Hanson in conversation in Purdon on the day of the killing. Witness and Munn passed them,—witness speaking to them. Munn did not speak, or if he did, witness did not hear or see him do it. The witness, on the morning after the killing, saw the pistol said to have been found on the ground near Munn's body. It was a nearly new bull-dog five shooter. Two or three chambers were empty and somewhat cankered. Witness thought that an empty chamber of a pistol

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would canker in one night if left on the ground. It might, however depend upon the weather as to whether or not it would canker in that time. Witness and Pink and Dan Lancaster examined that pistol closely for marks, but found none. It was insisted by somebody in the crowd that the said pistol was the same pistol that George Hanson publicly claimed some time before.

Justice of the Peace Walton testified, for the State, that he held the inquest on the body of Munn. He directed Dr. Bates to make a post mortem examination of the body. Witness saw fourteen wounds in the body, four of which were mortal wounds. He observed particularly the wounds in the temple, right side, hip and chest. He did not think all of the said wounds could have been made by the same discharge. They indicated that they were inflicted by different shots fired from different directions. One pistol was found on Munn's person, and another on the ground. The one found on the ground was taken apart on witness's order and examined for marks. No distinct marks were found on it, although some dim scratches were discovered, which might have been the stamp of the maker. Some time before a similar pistol, but with marks somewhere on it, was found at or near one of the neighbor's chicken roosts, and was afterwards claimed by George Hanson, and it was to discover the marks to identify the pistol found near the body as that claimed by George Hanson, that it was taken apart.

The State closed.

Several witnesses were called by the relators to testify about the tracks discovered in the vicinity of the killing. Their testimony did not vary materially from that of the witnesses for the State.

Bud Curry testified, for the relators, that he was the only Curry who lived in the neighborhood of the killing. R. J. Anderson, who testified on this proceeding as a witness for the State, was not at the witness's house on the night of the killing. If he was there on that evening the witness did not know it, and was satisfied that he would have known it had he come there. Witness heard some shots fired late that evening, but thought they were fired in a direction nearly opposite from where the killing occurred.

Henry Aderholt testified, for the relators, that it was after dark, and the night was very dark, when he and others got to Munn's body. They were at that place for some time before

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Statement of the case.

they got a light. The several parties present helped gather up the pieces of fence rails with which the fire was made. They scrambled around in the dark to get them, and it was quite a possible matter for some one of them to have fallen or stepped into the gully.

J. J. McClelland testified, for the relators, that, coming out of the sheriff's office, in Corsicana, on the day before the killing, he met Munn. Munn seized him in a friendly manner, as was his custom, and witness threw his arms about Munn's waist, in doing which he felt a pistol. Munn said: "Catching me under the circumstances, you wont have me pulled for it, will you?" Witness replied that he would not. Munn then said that he was going to apply to the sheriff for a deputyship in order to be entitled to carry a pistol, and asked witness if he thought the sheriff would appoint him. Witness replied that, in view of his, Munn's, recent trouble with the Hansons, he did not think the sheriff would appoint him. Alluding to his pistol, Munn replied: "This is for the Hansons. You recollect the trial at Dresden?" The trial referred to was the trial of the Hansons for the theft of wine, in which Munn assisted witness in collecting evidence for the prosecution. Munn's activity in that case appeared to embitter the feeling between the Hansons and himself, and he remarked to witness that if he, witness, had not been at that trial, he, Munn, would have "got" the Hansons then. Munn and old man Hanson had a difficulty in Corsicana a few weeks before the killing. Munn knocked old man Hanson, and was fined for it. He complained that he was "taxed" too much in that case. The witness remonstrated with Munn on the day before the killing, for carrying the pistol. He excused himself by saying: "Old man Hanson goes armed, and they are carrying a gun for me." He did not say which of the Hansons was carrying the gun. Munn's reputation was that he was an absolutely fearless man and a fighter. Witness did not know that he would seek and take advantage in a fight. On cross examination the witness said that the trouble between the Hansons and Munn antedated the wine theft prosecution. The Hansons, prior to the wine case, prosecuted one Jackson for libel, and on the trial undertook to prove that Munn wrote the libelous matter circulated by Jackson. Witness, at that time, was county attorney of Navarro county.

Simkins & Neblett, for the relators.

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Statement of the case.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Upon the evidence as presented to us in the record, we are of the opinion that the applicant George Hanson is entitled to bail. The judgment refusing him bail is reversed, and he is granted bail in the sum of five thousand dollars, upon giving which in the manner prescribed by law he will be released from custody.

There is no evidence in the record showing the ability of the applicants to give bail, and we are not prepared to say that the amount of bail required of the applicant John Hanson is excessive; wherefore the judgment as to said applicant is affirmed.

Ordered accordingly.

Opinion delivered May 15, 1889.

No. 6467.

SAM RILEY *v.* THE STATE.

1. THEFT—INDICTMENT.—The purpose of the indictment in this case was to charge the theft of a horse from the possession of one Henry Wright, but in drafting the indictment the pleader omitted the word "of" after the word possession. *Held*, that the omission is fatal to the conviction, inasmuch as the omitted word is essential to the accusation.
2. SAME—ACCOMPLICE TESTIMONY.—See the opinion in extenso for evidence of a State's witness *held* insufficient to inculpate the said witness as an accomplice to theft.

APPEAL from the District Court of Callahan. Tried below before the Hon. T. H. Conner.

The opinion discloses the case.

The penalty assessed by the verdict was a term of five years in the penitentiary.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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Opinion of the court.

HURT, JUDGE. This conviction was for the theft of a horse. The indictment omits to allege that the horse was taken from the possession *of* Henry Wright, the preposition "of" being omitted. This, we think, is fatal to the sufficiency of the indictment.

An indictment for playing at a game with cards, at a certain public place, etc., in which the word "at" is omitted before the words "a certain public place," is bad, because the word "at" in that connection forms an integral part of the description of the offense, and hence can not be supplied by intendment. (The State v. Huston, 12 Texas, 245.) We can perceive no difference in principle between the omission of "at" in the connection it should have been used and the word "of" in its proper place in this indictment. If "at" was necessary to a complete description of the offense sought to be charged, "of" is equally so to a complete description of the offense of theft.

Appellant was convicted upon the testimony of one Mark Munday, who was the only witness who swore to facts criminating the appellant. There were some circumstances slightly tending to show Munday an accomplice. The learned judge charged the jury very fully upon the necessity of corroborating this witness, and the character of the corroboration required by the statute, leaving it to the jury to determine whether Munday was an accomplice or not. This was correct, but it is contended by counsel for appellant that Munday was an accomplice, and that, as he is not corroborated, this conviction is wrong, and that the judgment for this reason should be reversed. This is a correct proposition if it be true that the witness was an accomplice in fact. What are the facts upon which it is sought to establish his complicity?

He states that Riley and Frank Munday rode up to the fence, and Frank called him (witness) out; that he went out to the fence and saw the appellant with the colt; that Frank said this is the colt that defendant traded me,—defendant being present holding the colt, but said nothing; that Frank asked me if he could put the colt in my pasture. I told him he could, whereupon defendant placed the colt in the pasture. That he was before the grand jury in April, 1888, when this matter relating to the theft of the colt was being investigated. That he testified before the grand jury in relation to this matter about as he did on this trial. That the grand jury indicted him for this

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theft, but the prosecution was dismissed at the October term, 1888.

A member of the grand jury was introduced by the appellant. He swears that Mark Munday was a witness before that body, and was interrogated with regard to the theft of the colt, but the witness did not remember the testimony.

These are all the facts which bear upon the question as to whether Munday was an accomplice. We hesitate not in saying that they do not possess that cogency which would justify this court in holding that the decision of the jury that Munday was not an accomplice was wrong, unless we infer that there must have been other facts before the grand jury upon which the indictment was found. We can make no such presumption.

It is not necessary that we pass on the sufficiency of the evidence to support the verdict, as the case may be tried again. Because the indictment is insufficient, the judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

Opinion delivered May 15, 1889.

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No. 6376.

TOM COFFELT *v.* THE STATE.

1. ROBBERY—EVIDENCE—NEW TRIAL—INDICTMENT for robbery having unnecessarily described the money of which the accused robbed the injured party as "lawful money of the United States of America," it was essential to the validity of the conviction that the kind of money be proved as alleged. The proof in this case, falling short of this requirement, does not support the conviction, and the accused should have been awarded a new trial.
2. SAME—VARIANCE.—The indictment alleges that the accused *took* the money from the person of F. The proof shows that the accused and another presented pistols at F., and demanded the money, and that F., in fear of his life or of serious bodily harm, and after being struck, delivered the money. The defense contends that this proof shows a delivery of the money by F. through fear, and, therefore, that there is a fatal variance between the allegation and the proof. But *held* that such a delivery is a *taking* within the purview of the statute defining robbery, and therefore there is no variance.

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Statement of the case.

APPEAL from the District Court of Brown. Tried below before the Hon. J. W. Timmins.

This conviction was for the robbery of W. H. Flippin, under an indictment the charging part of which is set out in the opinion. The penalty assessed by the verdict was a term of ten years in the penitentiary.

W. H. Flippin was the first witness for the State. He testified that he lived in the northern portion of Brown county, Texas, and for twelve years had known the defendant, who lived with his father about three miles distant from witness's house. Defendant and Tom Price galloped their horses to witness's place about sundown on the evening of February 21, 1888. By the time the witness recognized them they had their pistols presented close to his face, and one of them said to witness: "Hand up your checks, God damn you! Dig up that pot you have got buried! It is money we want! Dig it up!—We know you have got it! Dig it up,—God damn you, dig it up!" Tom Price then struck witness over the head with a pistol, and witness handed him his pocket book, which he passed to the defendant. The said pocket book contained four twenty dollar gold pieces, one five dollar gold piece, two ten dollar bills, one five dollar bill, and five silver dollars, aggregating one hundred and fifteen dollars,—all of which was the personal property of witness and was taken from him by defendant and Tom Price without his consent. Defendant's face was partially covered by a handkerchief, but witness recognized him both by his uncovered features and his voice, and could not be mistaken as to his identity. Tom Price was not disguised. After securing witness's pocket book defendant and Price marched witness and his two sons, Lige and Robert, to a point fifty-nine steps from where the robbery was perpetrated, and at that point Price produced a bottle and asked witness if he would not take a drink of Coleman City's best whisky. Witness declined, when one of the parties asked him: "Do you know us?" Witness replied that he did not, being afraid to tell the truth. Tom Price was then a stranger to the witness.

Cross examined, the witness said that the defendant's father moved away from witness's neighborhood about three years before the robbery. Witness could not say that defendant lived with his father constantly during the four years preceding the latter's removal, but during that time he often saw the

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defendant in that neighborhood. Defendant and Price were riding bay horses at the time of the robbery. Defendant was the man who ordered witness to "hand up his checks," etc. Price also ordered the witness to deliver the money. They were on their horses, with their pistols pointed at the witness's face. Price dismounted and came into witness's yard and received the pocket book from witness's hands. Witness knew Bob Westerman, who at the time of the robbery was living in the Pan Handle. He removed from Brown county to the Pan Handle two or three years before the robbery, but was in the county a few days before it occurred. Witness met and talked with him while he was on that visit. He did not recognize the said Westerman until he spoke. He thought at the time of the robbery that said Westerman was the party with defendant, and so stated to one or more parties afterwards. Price and Westerman were very much alike in build, and were about the same size and age. Witness then stated the several transactions in which he received the moneys of which he was robbed, but could not state the particular moneys or kind of money that he received in the several particular transactions, nor could he remember the dates of those particular transactions. Witness's sons, Lige and Robert Flippin, Lige's wife, and old man Douglass were at the witness's house at the time of the robbery. Robert was with witness at the time, and Lige was at the horse lot. Douglass and Lige's wife were in the house. The witness was kept in terror during the process of the robbery, and all of that time looked down the barrels of two forty-four calibre single action Colt's revolvers. Defendant and Price each wore a coat and black hat. Defendant's hat was over his eyes at first, but was afterwards pushed back. When defendant and Price started off with witness and his two sons, they said to witness: "Old man, tell your folks good bye." Price then said to defendant: "Let us shoot him." Defendant demurred, and the two rode off in a gallop. Soon after the robbery witness went with the sheriff to Cliff Westerman's house to see Bob Westerman. The Westermans were in bed but they got up, dressed, and received witness, the sheriff, and Deputy Sheriff Rushing. Cliff took witness off and said to him: "I understand that you charge that Bob is one of the men who robbed you." Witness made no reply to Cliff Westerman, but on the way home he said to deputy sheriff Rushing: "I believe I will go back and tell them that I thought Bob was

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one of the men who robbed me until I got a second look at him." The witness did not, after he was released by defendant and Price, say to the parties at his house: "Do any of you know who they are." Old man Douglass did not say: "I recognized Tom Coffelt's voice as soon as he spoke." Soon after the arrest of Price witness went to Eastland to look at and identify him. On his way home the witness passed Irby's house, and saw Irby plowing the horse ridden by Price on the evening of the robbery. Irby said that his said horse was stolen from him some time before.

Lige Flippin was the next witness for the State. He testified that he had lived with his father, the prosecuting witness, in Brown county, for twelve years, during which time he had known the defendant. The witness first saw the defendant, on the evening of the robbery, about a mile from his, witness's, father's house. Witness was then on his way home. Defendant and Tom Price were in the brush about thirty steps from the road. Witness went on home. Soon after his arrival defendant and Price rode rapidly to the gate where witness's father was standing, covered him with their pistols, and in the manner stated by witness's father on the stand, demanded the surrender of his money. Price then dismounted, went into the yard, and received the pocket book from witness's father, and said to him: "Dig up your pot, God damn you! Dig it up." He then seized a handkerchief, tied it around the old man's neck, jerked it until it came off, and then struck the old man over the head with his pistol. While Price was jerking the old man around, the latter said: "You may kill me, but I have no more money." Defendant and Price then marched the old man, witness and his brother to a point about sixty yards distant, before doing which Price told the old man to bid all of his children good bye. After reaching the point indicated Price asked the old man if he knew them, and said that if the robbery was ever reported he and defendant would return and kill the old man, witness and his brother. He then offered a drink of whisky to his victim. Defendant wore a handkerchief over his face, which covered his features from his eyes down. Witness was positive that defendant and Price were the men who robbed his father.

On cross examination, the witness said that he recognized the defendant when he saw him in the brush before getting home. The defendant had the handkerchief over his face at

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that time. He also had his hat pulled down over his eyes. When the old man handed Price the pocket book, Price said that he was not there to fool with that "little dab," but that the old man must dig up his pot. During the time that Price was jerking the old man around, the defendant held the witness at bay with his cocked pistol, repeatedly ordering witness not to move.

Robert Flippin, the twelve year old son of the prosecuting witness, testified, for the State, substantially as did his father and brother.

Old man Douglass testified, for the State, that he was so nearly blind that he was unable to recognize a person by sight at the distance of ten or twelve feet. He was at W. H. Flippin's house at the time of the robbery, and heard, but could not see, what transpired. He was confident that he recognized the voice of one of the men who perpetrated the robbery as that of the defendant. He could not, of course, otherwise swear to the identity of the defendant. When old man Flippin returned to the house after the robbery he asked: "Do any of you know either of those men?" Witness replied: "I took one of the voices as that of Tom Coffelt." He was the first to suggest defendant's name.

On his cross examination, the witness said that he was in a violent fright at the time of the robbery, and could not swear positively to the voice of defendant, but was satisfied in his own mind that one of the voices was his.

The State closed.

The defendant's first witness was N. A. Perry, sheriff of Brown county. Mr. Perry testified that Tom Price was now a prisoner in his custody. The said Price was a young man about twenty-one years old, tall and straight in stature, with dark hair, keen dark eyes, high thin nose, prominent features, and on the whole a rather "good looking" young man. He knew Bob Westerman, who was now in the court room. The said Westerman was of short stature, heavy build, with round shoulders, round fat face, short nose, of lighter complexion than Price, and about twenty-three or twenty-four years old.

W. H. Roach testified, for the defense, that he lived at the town of May, about twenty miles north of Brownwood. Witness remembered the reported robbery of Mr. W. H. Flippin, which was said to have occurred on the evening of February 21, 1888. The robbery of the bank in Cisco occurred a day or

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Statement of the case.

two before the robbery of Flippin. The witness was at Sipe Springs, about ten miles from May, about a week after the Flippin robbery. While witness was at Sipe Springs, Tom Price was brought in under arrest, being charged with the robbery of the Cisco bank. He was riding a bay horse which Mr. Irby, who was then in the said town, identified as a horse that was stolen from him six or seven weeks before. Price was held on the charge of stealing Irby's horse, and not on the charge of robbing the bank.

Jo Coffelt testified, for the defense, that he now lived, and for ten years past had lived, in Tom Green county, about eighteen miles north from San Angelo, and about one hundred miles from Brownwood. He was now living with Mr. Barfield. Defendant, who was witness's brother, also lived in Tom Green county, and at the time of his trial had lived there seven or eight years. Witness and defendant left Tom Green county on February 8, 1888, to go to Colorado City, in Mitchell county, Texas. They reached Colorado City on February 10, remained there until the fourteenth, when they went to Mr. Holloway's place, about twenty miles from Colorado City. The witness remained at Holloway's and defendant went on toward "home." Witness got home on the eighteenth of the month, remained on the nineteenth and perhaps the twentieth, and left, going on the twentieth or twenty-first to Lum Hudson's, where he remained until the last of the week. Hudson lived in Tom Green county, about sixteen miles north of San Angelo, and about half a mile from Norfleet's house. Witness's horse escaped from him on the night of February 21, 1888, and witness left Hudson's on the morning of the twenty-second on foot, to look for him. He took dinner that day at Norfleet's. Immediately after dinner the defendant rode up to Norfleet's and witness borrowed his horse and continued the search for his own horse. He found his said horse on the next day, February 23, and took defendant's horse to Norfleet's house, where defendant still was.

On his cross examination the witness verified the dates mentioned in his testimony by various incidents. He testified that, when he and defendant left Tom Green county on February 8, to go to Colorado City, he had not seen Tom Price for quite a month. Witness and defendant separated at Holloway's, near Colorado City, on the fifteenth or sixteenth of February, and witness did not see defendant again until he came to Norfleet's house, in Tom Green county, about noon on February 22.

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When they separated at Holloway's defendant wore off the witness's white Stetson hat, and rode the witness's sorrel pony. He came to Norfleet's on February 22, wearing the same hat and riding the same pony. Defendant was arrested in Coleman City on March 8, 1888, while en route to Baird as an attached witness in a case pending at Baird.

Lum Hudson testified, for the defense, that he lived in Tom Green county, Texas. He knew defendant and his brother Jo Coffelt, both of whom also lived in Tom Green county. Jo Coffelt came to witness's house on Monday, February 20, 1888, and remained there until the end of the week. Defendant ate supper at the witness's house on the evening of February 23. Jo Coffelt's horse escaped from him while at witness's house. Jo left on foot to hunt for that horse and returned to the house that night riding a small sorrel pony. He found his escaped horse on the next day. On cross examination the witness said that he remembered the date on which defendant ate supper at his house by reason of the fact that, when defendant got there, he said that he was on his way to the party at the house of one Wilson, who lived in the neighborhood, and that party occurred on the night of February 23, 1888. When he came to witness's house that night defendant was wearing a white hat and riding a sorrel pony.

Jasper Norfleet testified, for the defense, that he lived in Tom Green county, about sixteen miles from San Angelo, and about one hundred miles from Brownwood, in Brown county. Defendant was at witness's house on the sixteenth and seventeenth days of February, 1888. Witness saw him two days later—February 19—at the OL ranch, between witness's house and San Angelo. He came back to witness's house on the twenty-second day of the same month, and was there on the twenty-third. Of these dates witness was positive. Besides the defendant the two Coffey boys and Mr. Butten ate dinner at witness's house on February 23.

Frank Norfleet, for the defense, corroborated the statement of the preceding witness, who was his father, adding that Tom Price was with the defendant when he saw the defendant at the OL ranch of February 19, 1888. In coming to Norfleet's house on the twenty-second of February, defendant came from toward Mr. William Cowley's house.

William Cowley and his son Tol Cowley testified, for the defense, that they lived about three miles from Norfleet's house

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in Tom Green county, Texas. Defendant came to their house on Monday, February 20, 1888, remained that day and night and the next day and night, and left on the morning of February 23, 1888. They next saw defendant at Wilson's party on the night of Februarv 24, 1888. Wilson lived on William Cowley's place.

Scott & Jenkins, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for robbery. The indictment charges that appellant "did then and there, in and upon the body of W. H. Flippin, make an assault, and did then and there by said assault and by force and violence to the said W. H. Flippin, in fear of life and bodily injury, fraudulently and without the consent of the said W. H. Flippin, take from the person and possession of the said W. H. Flippin, who was then and there the owner thereof, five certain twenty dollar gold pieces of the value of twenty dollars each, good and lawful gold coins of the United States of America; also one certain five dollar gold coin, good and lawful money of the United States of America, of the value of five dollars; also two ten dollar bills of the denomination of ten dollars each, good and lawful money of the United States of America, of the value of ten dollars each; also one five dollar bill of the denomination of five dollars, good and lawful money of the United States of America; also five silver dollars, good and lawful money of the United States of America, of the value of one dollar each," etc.

Counsel for appellant assigns for error the overruling of the motion for new trial based upon the insufficiency of the evidence to support the verdict, "because there was no evidence showing the kind or value of any of the money, as alleged in the indictment." All of the money is alleged to be the lawful money of the United States of America. It is contended that the proof fails to show that any of the money was the coin or bills of the "United States of America." Unquestionably this is a description of the coins and bills alleged to have been taken from Flippin, and hence a description of the particular offense charged against appellant. This being the case, while an unnecessary description, still it must be proved. (Childers v. The State, 16 Texas Ct. App., 527; Gray v. The State, 11

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Texas Ct. App., 411; Cameron v. The State, 9 Texas Ct. App., 336; 21 Texas Ct. App., 212.)

The indictment alleges that the robbery was effected by an assault upon the body of Flippin, and also by force and violence to the said Flippin. There is no allegation that it was effected by 'putting him in fear of life or bodily injury." Something is said in the indictment about fear of life or bodily injury, but there is no allegation that Flippin was put in fear of anything.

The indictment alleging that appellant *took* the money from the person of Flippin, and the proof showing that Flippin delivered the money to the appellant, counsel for appellant contends that there is a variance, and that the allegation that appellant *took* the money is not sustained by the proof. What are the facts bearing upon this point? Flippin says that appellant and Tom Price galloped to his house about sundown; that the first he saw of them, to know them, they had their pistols in his face and said "hand up your checks, God damn you; dig up that pot that you have got buried. It is money that we want. Dig it up, we know that you have got it. Dig it up, God damn you, dig it up." Tom Price hit him on the side of the head with a pistol, and he gave Price his pocket book, and he handed it to appellant.

Now it is contended that this does not show a *taking* of the money, but a delivery of the money by Flippin through fear. A presents a cocked pistol toward B and demands his money. B, through fear of loss of life or great bodily injury, delivers to A his money. We are seriously told that A did not take B's money. The authorities and common sense say that he did *take* B's money. But counsel for appellant admits this would be a taking of the money but for article 723 of the Penal Code. This article has no reference whatever to the state of facts presented in this record. They are provided for in article 722. This is evident, because appellant and Price not only exhibited fire arms, but used them in the commission of the offense, and in such a case the punishment may be for life, while the penalty for a violation of article 723 is not less than two nor more than five years.

As the case will have to be tried again, we will not give our views on the evidence. Because the State failed to prove that the money taken was United States money, as alleged, the judgment is reversed and the case remanded for another trial.

Reversed and remanded.

Opinion delivered May 15, 1889.

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Statement of the case.

No. 6414.

SAM MASSIE v. THE STATE.

AGGRAVATED ASSAULT—EVIDENCE—FACT CASE.—See the statement of the case for evidence *held* to have been improperly admitted because hearsay; and for evidence *held* insufficient to support a conviction for aggravated assault because it shows that the violence inflicted by the defendant was justified in resisting an illegal arrest.

APPEAL from the County Court of Parker. Tried below before the Hon. I. N. Roach, County Judge.

The conviction was for an aggravated assault upon J. A. Rutledge. The penalty assessed by the verdict was a fine of twenty-five dollars.

J. A. Rutledge was the first witness for the State. He testified that the offense for which this defendant was now prosecuted was committed upon him, the witness, as alleged in the information, on the sixteenth day of June, 1888. The place of the assault was at the gate of William Edgings's pasture, in Parker county, Texas. It consisted of several blows inflicted with a whip, in the hands of defendant, upon the head, arms and hands of the witness, hurting him severely but not seriously—the said whip being an instrument calculated to inflict disgrace upon the witness. The assault was committed under the following circumstances: Mrs. Sarah Lambert told Deputy Sheriff E. E. Taylor that certain cattle belonging to her had been stolen, and on the day before the assault Miss A. Lambert, the daughter of Mrs. Sarah Lambert, told Taylor that on the day previous she saw the defendant and two others driving the said cattle. The witness and E. E. Taylor then went by the house of Constable G. W. Taylor, and told him what they had heard about the theft of the Lambert cattle, and E. E. Taylor went home with witness and spent that night. G. W. Taylor came to witness's house on the next morning, and he and E. E. Taylor and witness went to Edgings's pasture to look for the cattle and arrest the defendant. Arriving at the pasture, E. E. Taylor directed witness to remain at the gate while he and G. W. Taylor should go through the pasture. They expected to

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find the cattle in that pasture, because Mr. Edgings, on that morning, told them that defendant and George Copeland, on the morning of June 14, drove the said cattle to his, Edgings's, lot, branded them, and then turned them into his, Edgings's, pasture. The said pasture was about ten miles from Mrs. Lambert's place. When witness took his position at the said gate, E. E. Taylor told him to remain there, and that if defendant, Copeland, Frank Kirby, or either of them, should come after the cattle, to hold them until he and G. W. Taylor got back. The Taylors had been gone about thirty minutes when the defendant rode up to the gate from the inside of the pasture. As he reached the gate witness advanced and placed his left hand on the neck of defendant's horse. After a few minutes of conversation, defendant said: "Well, I must be going." Witness replied: "Oh, no! Let's talk awhile." Defendant declined, when witness proposed: "Let's sing something like we used to when we went to singing school." The suggestion was vain—if not unfortunate—for instead of lifting up his voice in melody and song, the defendant viciously kicked his horse, and, as witness seized the reins to hold him, showered blows with his whip on the head of the witness, and on his arms and hands. Witness, however, clung to the bridle, and defendant, failing to release his grasp by using the whip on him, applied it to his horse, with as little success in releasing that animal. Thereupon he stretched forth his arm, pushed the bridle off his horse's head, and rode off, leaving the witness, literally, "with the bridle to hold." In all that he did on this occasion the witness acted by direction of Deputy Sheriff Taylor, who summoned him as a posse to assist in the arrest of defendant and others for stealing Mrs. Lambert's cattle.

On his cross examination the witness said that he was not a peace officer at the time of the arrest, and that he had no warrant when he attempted to arrest the defendant, nor did he know that a warrant had ever been issued for the arrest of defendant.

E. E. Taylor, deputy sheriff of Parker county, was the next witness for the State. He testified that on or about the date alleged in the information he received word from J. A. Rutledge, who lived about twelve miles from Weatherford, that some cattle had been stolen from his, Rutledge's, neighborhood. Witness went to Rutledge's house at once, and he and Rutledge went to see Mrs. Lambert, from whose possession, as the cus-

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todian of the cattle for one Edwards, the owner, the cattle were alleged to have been taken. Mrs. Lambert and her daughter told witness and Rutlege that the defendant, George Copeland and Frank Kirby came to their place on the previous day and drove off two two-year old heifers. This part of the witness's testimony is the evidence held by this court to have been erroneously admitted, over the defendant's objection, as hearsay. The witness summoned Rutledge to go with and assist him in the arrest of defendant, Copeland and Kirby. Witness and Rutledge went by Constable G. W. Taylor's house that evening, reported the alleged theft to him, and then went to Rutledge's house, where they passed the night. On the next morning the witness, Rutledge and G. W. Taylor went to Edgings's pasture, where they expected to find the cattle. Rutledge was left at the pasture gate with instructions to arrest either or all of the said parties if they "showed up." The witness and G. W. Taylor then rode over the pasture in search of the cattle.

On his cross examination the witness said that he had no warrant for the arrest of defendant, his purpose being to find him in possession of the cattle and arrest him. G. W. Taylor had no warrant for the arrest of defendant. Witness did not tell Rutledge that he had no warrant.

The State closed.

Constable George W. Taylor testified, for the defense, that C. Lemmons, justice of the peace of precinct number four, Parker county, lived about four miles from the house of Mrs. Sarah Lambert. The witness went with Deputy Sheriff Taylor and Rutledge to Edgings's pasture on the day of the alleged assault. He had no warrant for the arrest of defendant. The witness and the two said parties went to the pasture to find two certain two-year old heifers, said to have been placed in the said pasture two days before. Their purpose was to identify the animals, and they did not expect to find either the defendant or Copeland or Kirby in the pasture. On cross examination the witness said that he did not know where the defendant went to on the day of and after the alleged assault, but he fled the country and was gone about six months. It was the information of the witness that Sheriff Sisk finally arrested defendant in Kaufman county, on the charge of stealing the Lambert cattle—which case is still pending against him.

No brief on file for the appellant.

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Statement of the case.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Objections of defendant to statements made by Mrs. Lambert to the State's witness, Taylor, were well taken and should have been sustained by the court, and the evidence excluded, being clearly hearsay testimony and inadmissible.

We are further of opinion that the evidence is wholly insufficient to support the verdict and judgment. In our opinion the evidence shows most clearly a case of illegal arrest of defendant by Rutledge, the alleged injured party, and that defendant was jutifiable in using the force complained of in effecting his release. (Willson's Crim. Stats., sec. 976; Meuly v. The State, 26 Texas Ct. App., 307.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered May 15, 1889.

No. 6383.

HENRY BAWCOM *v.* THE STATE.

ASSAULT—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a conviction for assault.

APPEAL from the County Court of Llano. Tried below before the Hon. E. C. Bonham, County Judge.

The information charged an aggravated assault, and the verdict found appellant guilty of a simple assault and assessed the penalty at a fine of five dollars.

Belton Waits was the first witness for the State. He testified that he lived in Llano county, Texas, about twelve miles distant from the town of Llano. On the morning of July 12, 1888, the witness and his brother Clabe went to work in the field that they had rented from Mrs. M. J. Chadoin. Their work was cutting top fodder. The defendant and Mr. and Mrs. Chadoin and Travis Chadoin were engaged in like work in another part of the said field. Witness's brother called to J. A. Chadoin to

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come to where he and witness were, as he desired to see the said J. A. Chadoin alone, about the top fodder. J. A. Chadoin came to where witness and Clabe were, and he and Clabe retired to a point fifteen or twenty steps distant from witness, squatted down in the weeds, and proceeded to talk about the fodder. While Clabe and J. A. Chadoin were thus engaged, the defendant came to a point near the witness and said to him: "What kind of a game is this you are giving aunt about the fodder?" Witness replied: "Go away and don't bother me." Defendant then advanced to a point within two or three steps of witness, holding a butcher knife in one hand and a case knife in the other, and said to witness: "I will carve your damned heart out of you." Witness backed off and turned to go home, when defendant said to him: "Go on home and get your daddy, and tell him to bring his gun and two or three more if he has them." Witness then went home, passing near Clabe and Jim Chadoin.

On his cross examination, the witness said that he and his brother had rented and were cultivating Mrs. Chadoin's field. They were to pay, as part of the rent, one-third of the fodder grown. Witness and Clabe were cutting fodder on that part of the field which they had reserved for themselves, and the Chadoins and defendant were cutting fodder on the part of the field they had assigned to Mrs. Chadoin. Defendant was a nephew of Mrs. M. J. Chadion, and was working for her at the time of the difficulty. J. A. and Travis Chadoin were near by when the difficulty occurred. Defendant was whetting the knives together when he approached and spoke to the witness. Witness supposed that defendant had been cutting fodder with one of the knives.

The State rested.

Travis Chadoin was the first witness for the defense. He testified that he was present and witnessed the trouble between defendant and Belton Waits. While the parties named by Waits in his testimony were cutting fodder in the field, Clabe Waits called to J. A. Chadoin to go and talk with him about the fodder. When Clabe and J. A. Chadoin stepped aside, the defendant asked Belton Waits: "What kind of a game is this you are putting up on aunt, in cutting all the fodder and leaving none for rent?" Belton Waits replied to defendant: "That is none of your damned business!" Defendant replied: "I suppose it is some of my business, as my aunt employed me to

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cut her part of the fodder, and I don't intend to see her treated so." Belton Waits then said: "I will go home and get my father, and he will settle with you." Defendant replied: "Go home and get your father; I can reason with him." Belton Waits then went home, and defendant, witness and Mrs. J. A. Chadoin went to where J. A. Chadoin and Clabe Waits were talking. During the whole of the conversation between defendant and Belton Waits, the witness stood within two feet of defendant, and he knew that defendant did not strike nor attempt to strike Belton Waits with a knife or anything else, nor did he make any threat to strike or do him violence. Defendant had two old knives in his hand, sharpening them by whetting them together, which said two knives he had been using in cutting fodder.

On cross examination, the witness said that defendant spent a large part of his time at the house of his aunt, Mrs. M. J. Chadoin, and was in her employ at the time of this difficulty. He had nothing to do with the management of Mrs. Chadoin's business. J. A. Chadoin was Mrs. M. J. Chadoin's business manager, and both witness and defendant worked under the orders of J. A. Chadoin.

Mrs. J. A. Chadoin testified, for the defense, substantially as did the witness Travis Chadoin, stating positively that defendant neither struck, struck at nor threatened to strike Belton Waits.

J. A. Chadoin testified, for the defense, that on the morning of July 12, 1888, while he and his wife, defendant and Travis Chadoin were cutting rent fodder on the land rented by the Waits boys from witness's mother, the brother of defendant, Clabe Waits, called witness to him to talk over the disagreement about the fodder. Witness, accompanied by his wife, defendant and Travis Chadoin, went to where the Waits boys were. Clabe requested witness to step aside, as he wanted to talk to witness privately. While talking with Clabe Waits the witness heard Belton Waits say: "It is none of your damned business." Witness, who was then squatted, raised up and saw all that transpired between defendant and Belton Waits. Defendant was standing still, whetting two old knives together. Witness told the boys not to have a fuss. About that time all of the parties on the ground came to where witness and Clabe Waits were. Belton Waits started home, saying that he would get his father to settle the matter. Defendant replied to him:

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"If you will get your father we can reason the matter." Witness then told Belton that he and Clabe had settled the disagreement about the fodder, and for him, Belton, to come back. Clabe Waits told Belton the same thing, but Belton refused to come back and went on home. Mrs. M. J. Chadoin was the mother of the witness. Her entire business was under the management of the witness, and defendant was then working under witness for Mrs. M. J. Chadoin.

The defense closing, the State introduced Clabe Waits in re buttal. He testified that immediately after the alleged assault upon Belton Waits by defendant, the several parties in the field came to where witness and J. A. Chadoin were talking over the fodder matter. Belton Waits was then told by defendant to go and get his father and to tell his father to bring his gun and four or five more if he had them.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Because we are of opinion that the facts shown in the record before us are wholly insufficient to support a conviction for an assault by appellant upon the alleged injured party, Belton Waits, the judgment is reversed and the cause remanded. The case is not analagous to Coker's case, 22 Texas Court of Appeals, 20.

Reversed and remanded.

Opinion delivered May 15, 1889.

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No. 6458.

J. H. HANNAH v. THE STATE.

THEFT—CHARGE OF THE COURT—CIRCUMSTANTIAL EVIDENCE—POSSESSION OF RECENTLY STOLEN PROPERTY—FACT CASE.—See the statement of the case for charges of the court on circumstantial evidence and upon the possession of recently stolen property, *held* erroneous, and see the same for evidence *held* insufficient to support a conviction for theft.

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Statement of the case.

APPEAL from the County Court of Burnet. Tried below before the Hon. R. W. Cates, County Judge.

The conviction in this case was for the theft of two cotton sacks, and three hundred pounds of seed cotton, of the aggregate value of eight dollars. The penalty assessed by the verdict was a fine of twenty-five dollars and imprisonment in the county jail for sixty days.

Peter Baumgardner was the first witness for the State. He testified that he lived on Rock creek, in Burnet county. He left his wagon, containing a quantity of seed cotton, and two certain cotton sacks, standing in the field of his said place on the night of September 10, 1888. The said two sacks, one being a new one, and the other an old one made of an old wagon sheet, and about three hundred pounds of the seed cotton, were stolen from the said wagon on the said night. The sacks and cotton so taken were of the aggregate value of eight dollars. Upon discovering the theft on the next morning the witness and certain of his neighbors, in looking over the premises, discovered a trail marked at intervals by locks of cotton. They were able to trace that trail down the Burnet and Belton road about half a mile, where they lost it. The point where they lost the said trail was about a mile and a half from defendant's house. At that point they discovered the trail of two horses which they followed, in the direction of defendant's house, to a point about a mile distant from defendant's said house. One of the horses was shod in front. The other horse was unshod, and had a "gotch" broken from one of his feet. When they lost this trail the witness and his friends, in search of the cotton, went first to Mr. Reed's and then to Mr. Russell's house, and thence to the defendant's. They found defendant in his field picking cotton, and told him of the theft of the witness's cotton and sacks on the previous night. The information thus given the defendant apparently excited him, and he sat down on the sack he then had in use. Witness remarked that the said sack then in defendant's possession looked like one of the sacks that he had lost, and asked permission to examine it, with which request defendant at once complied, but claimed at the time that the sack was his property. Witness turned the sack partly wrong side out, and told defendant that the sack looked like his, but that he might be mistaken. Witness and his friends then started off. When they had gone a short

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Statement of the case.

distance witness told his friends that the sack then in possession of defendant was in fact one of the sacks stolen from his wagon on the previous night. Witness and his party then went back and arrested defendant. Defendant then requested witness and his party to search his premises for the missing cotton. The search failed to discover any cotton that witness could identify as his property. Defendant then directed witness to the best crossing of Rocky creek. After crossing the creek at that point, and getting across the prairie beyond, the witness and his party discovered the trail of two horses, the tracks corresponding to the tracks previously followed on that day. That trail led the witness and his party to a certain place in the fence around the defendant's field, where the fence had evidently been recently taken down to admit the passage of the two horses, and then replaced. The horses went into defendant's field, and on the trail just outside of the field, witness discovered two or three locks or pods of seed cotton.

On his cross examination, the witness stated that he fully identified the sack found in defendant's possession and now exhibited to the jury, as his property, and as one of the same sacks that were stolen on the said night. The witness and his wife made the said sack of a part of an old wagon sheet. The witness had used it a few times as a cotton sack, and had never had bran in it. He had never pinned up a hole in the bottom of the said sack with a needle. Turning the sack wrong side out in the presence of the jury, the witness said: "I find what appears to be bran in the bottom of this sack, and I find in the bottom of this sack a rusty needle which appears to have been used to close a hole in the sack." Quite a number of people lived in the witness's neighborhood and along the road over which the witness followed the men and the horse tracks, as described. At a point in the road about a mile from his, witness's, said field, the witness found the impress of a number nine shoe. It showed a patch on the bottom in which there were six tacks. Witness afterward observed the same peculiarities in a track he saw defendant make in the field, and a measurement showed the two tracks to be of the same exact size.

Mrs. S. A. Baumgardner, the wife, and John Baumgardner, the son of the prosecuting witness, identified the sack in evidence as the property of the said prosecuting witness, and

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Statement of the case.

stated further that, so far as they knew, it had never contained bran, and had never been pinned with a needle.

The State's witnesses J. N. Clark and David Houghton testified substantially as did Peter Baumgardner as to the trailing of cotton locks and the horse tracks over the road, and the discovery, at a point in the road about a mile distant from the Baumgardner field, of a foot track that corresponded with that of defendant.

The State rested.

Mrs. S. A. Hannah, the wife of defendant, was the first witness for the defense. She testified that she and her husband lived in Burnet county about three miles distant from Baumgardner's place. She knew that defendant owned a cotton sack similar in every respect to the sack in evidence, but she was unable to identify the sack in evidence as that particular sack. She knew as a matter of fact that the defendant was not away from his home on the night of the alleged theft. She knew it from the fact that three of her children were sick on that night, and she and defendant sat up throughout the whole of the night administering medicine to and attending upon them. They lost one of their said children in that sickness.

Jim Rutledge testified, for the defense, that he hunted for cows on the day preceding the night of the alleged theft, and in doing so traveled over the route indicated by the State witnesses in their testimony on this trial as to a trail of horses followed by them. He found two of his said cows in the defendant's field, and to get into the field he tore down the fence at the place indicated by the State's witnesses. He then drove his cows out of the said field at a different place, and then rode through defendant's cotton patch and out of the field at the place where he had pulled down the fence, and then replaced the fence. State's witness Nix measured the track of his horse and told witness that, to the sixteenth of an inch it fitted the track trailed by him and Baumgardner and others from the field whence the cotton and sacks were alleged to have been taken.

J. W. Williams testified, for the defense, that about three weeks before the alleged theft he witnessed the purchase of some seed cotton in sacks by defendant from John Ervin. The sack in evidence looked like one of the sacks purchased by defendant from Ervin. About two weeks before the alleged theft witness borrowed some sacks from defendant for use in trans-

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Statement of the case.

porting bran. One of these sacks was made from an old wagon sheet, and it had a hole in the bottom. Observing the escape of bran, the witness, having no pin, pinned up the hole with a needle. The sack in evidence showed to have been used once to hold bran, and it had a hole in the bottom into which a needle was yet pinned. Witness returned the sack he borrowed to defendant about September 1, 1888.

Defense closed.

Jonathan Nix was then called to the stand by the State. He testified that, after arresting the defendant, he, witness, took charge of the sack found in his possession—being the sack now in evidence—and that said sack had been in custody of officers of the law ever since, and that neither the defendant nor his counsel had been permitted to see or examine that sack, after its seizure, until produced by the State, in evidence on this trial.

The court's charge on circumstantial evidence, referred to in the headnote, reads as follows: "In this case the State relies upon circumstantial evidence, and to justify a conviction on such evidence alone, the facts relied upon must be absolutely incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The charge upon recent possession also involved in the ruling of the court reads as follows: "You are further instructed that if a party in whose possession property recently stolen fails satisfactorily to account for his possession, the presumption of guilt arising from recent loss and possession will warrant a presumption of theft, and proof of possession of a part of the stolen property, if unexplained, will support a conviction for theft of all of it, and that it was all taken at the same time; but proof of possession will not be sufficient to warrant a conviction, if the other facts in evidence are not consistent with the guilt of the defendant. You are further instructed that if a person found in possession of recently stolen property makes an explanation of his possession of said property, at the first opportunity offered, and such explanation is reasonably and probably true, it operates to rebut the presumption of guilt arising from his possession of the property and in such case, if such explanation be not shown to be false, further evidence of defendant's guilt will be required to warrant the conviction; but the State is only required to prove the falsity of the defendant's

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explanation made at the time his possession was challenged, and the State can not be required to disprove every conflicting explanation the defendant may have made."

J. G. Cook and *T. E. Hammond*, for the appellant, citing against the sufficiency of the evidence to support the conviction, Rosborough v. The State, 43 Texas, 570; Rodriguez v. The State, 5 Texas Court of Appeals, 256; Pogue v. The State, 12 Id., 283; Roberts v. The State, 17 Id., 82; Windham v. The State, 19 Id., 413: and upon the proposition that the charge of the court upon the recent possession was erroneous, the following: White v. The State, 13 Texas, 133; Burrell v. The State, 18 Id., 713; Perry v. The State, 41 Id., 484; Anderson v. The State, 2 Texas Court of Appeals, 10; Watkins v. The State, Id., 73; Merritt v. The State, Id., 173; Williams v. The State, 4 Id., 178; Bejarano v. The State, 6 Id., 282; Maddox v. The State, 12 Id., 429; Davis v. The State, 10 Id., 31; Gose v. The State, 6 Id., 121.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. In this case the Assistant Attorney General frankly confesses that he can not ask an affirmance of the judgment. The evidence is wholly insufficient to sustain the verdict and judgment, and even if the evidence was sufficient the judgment would have to be reversed on account of errors in the charge of the court, both in regard to the instructions as to circumstantial evidence and recent possession.

Reversed and remanded.

Opinion delivered May 15, 1889.

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No. 6478.

EX PARTE W. M. ROBERTSON.

1. CIVIL AND CRIMINAL CONTEMPT OF COURT.—Criminal contempt of court consists in the doing of an act in disrespect of the court or its process, or which obstructs the administration of justice, or tends to bring the court into disrepute; and such contempt, if committed in a justice of the peace's court, may be punished by the justice of the peace by fine not exceeding twenty-five dollars, and imprisonment not

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Opinion of the court.

exceeding one day. Civil contempt of court consists in failure or refusal to perform an act ordered by the court for the benefit of another party.

SAME—CASE STATED.—The relator, who is constable of precinct number three, of Travis county, was charged with the execution of a writ of sequestration sued out of the justice's court. Failing to execute the same, he was proceeded against in the said justice's court by the plaintiff in the writ. Acting under article 4539 of the Revised Statutes, the justice of the peace adjudged the relator guilty of contempt of his court, fined him in the sum of thirty-nine dollars and nineteen cents to inure to the plaintiff in the writ of sequestration, and committed him to jail until payment of said fine and costs. *Held* that the failure and refusal of the relator to execute the writ of sequestration constituted civil contempt of the said justice's court, and that the justice exercised his legal authority in so adjudging him guilty, and in imposing the said fine and committing him pending payment thereof.

3. SAME.—A fine imposed for contempt is not "debt" within the meaning of section 18 of the Bill of Rights, which provides that "no person shall ever be imprisoned for debt."

4. SAME—JUDGMENT AND THE COMMITMENT in this case are both void because they omit the essential recital that it was within the power of the relator, as constable, to execute the writ; and the commitment is void for the further reason that, upon its face, it commits the relator on a fine imposed for criminal contempt. Wherefore the relator is discharged without day.

HABEAS CORPUS on original hearing in the Court of Appeals, on application from Travis.

The opinion discloses the case.

Carleton & Ruggles, for the relator.

W. L. Davidson, Assistant Attorney-General, for the State.

WHITE, PRESIDING JUDGE. In this case an original writ of habeas corpus was granted, returnable to this court, on the petition of applicant alleging that he is illegally restrained of his liberty by the Sheriff of Travis county acting by virtue of a certain writ of commitment issued by one J. A. Stuart, a justice of the peace in and for precinct No. 3 of Travis county, Texas, on the eighth day of April, 1889. Said order or writ of commitment being in words and figures as follows, to-wit:

"The State of Texas,

To the sheriff of Travis County, Greeting:

Whereas a judgment was rendered by me, J. A. Stuart, a

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justice of the peace in precinct No. 3 in the county of Travis, adjudging W. M. Robertson guilty of contempt of court, and a fine of $39.19 was entered against said Robertson, and judgment was by me rendered on the 8th day of April, A. D., 1889, that the State of Texas recover of the said defendant W. M. Robertson the sum of thirty nine and 19-100 dollars, the fine assessed by the court, and all costs amounting to the further sum of 60-100 dollars, these are therefore to command you forthwith to take into custody and keep him, the said W. M. Robertson, until the above fine and costs are paid as provided by law.

Herein fail not, but execute this warrant of comitment as the law directs, and fail not to return the same with your endorsement thereon, how it was executed.

Given under my hand at office, this the 8th day of April, 1889.

J. A. STUART,
Justice of the Peace,
Precinct No. 3, Travis Co. Texas."

It is claimed that said commitment is illegal and unauthorized by law, and exceeds the limits within which our statutes permit justices of the peace to fine in cases of contempt; the provision of the statute being that "they shall have power to punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars, and by imprisonment not exceeding one day." (Rev. Stat. art. 1541.)

If the fine imposed had been for a criminal contempt this statute would have been applicable and the objection would have been fatal to the proceeding. Such, however, does not appear to have been the nature of the proceeding. It is shown that the applicant Robertson, as constable, was fined by the justice for failing and refusing to execute and return according to law a writ of sequestration issued in a certain civil cause pending in the justice's court, wherein one A. A. Cooper was plaintiff and one E. O. Sanford was defendant; that a motion was made against said constable by the plaintiff Cooper to have him fined for failing to execute said writ, upon the hearing of which the court adjudged him "guilty of a contempt of court for failing and refusing to execute and return said writ," and that he "be fined in the sum of thirty-nine dollars and nineteen cents, which said sum, when collected, shall inure to the benefit of A. A. Cooper, the plaintiff in said cause," and that the "said Robertson be committed to the county jail of Travis county,

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Texas, until said sum of thirty-nine dollars and nineteen cents, together with all costs, is paid into this court." This was the judgment upon which the order and writ of commitment set forth above were issued. The justice based his action upon the provisions of article 4539 of the Revised Statutes, which declares that "if any constable shall fail or refuse to execute and return according to law any process, warrant or precept to him lawfully directed and delivered, he shall be fined for a contempt, on motion of the party injured before the court from which such process, warrant or precept issued, in any sum not less than ten dollars nor more than one hundred; with costs, which fine shall be for the benefit of the party injured; and said constable shall have ten days notice of such motion." It seems that all the provisions and requirements of this statute were substantially if not literally observed in the proceedings which resulted in the justice's judgment, but it is insisted for applicant that, whilst it may be conceded that under this statute the justice had the authority to fine the constable, still the statute gives him no authority to commit him to jail as for a contempt until such fine and costs were paid.

Contempts are of two kinds, civil and criminal. "Civil contempts are those *quasi* contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court; while criminal contempts are all those acts in disrespect of the court or of its process, or which obstruct the administration of justice, or tend to bring the court into disrepute," etc. (Rapalje on Contempts, sec. 21.)

Contempts are also classified into direct and constructive contempts. Direct contempts are punishable summarily, while constructive contempts require a different and less summary process. We have already seen that for what may be termed criminal or direct contempts, our statute above quoted (Rev. Stats., art. 1541) expressly provides that the party may be fined and imprisoned.

The question is, the statute (Rev. Stats., art. 4539) being silent as to the imprisonment for constructive or civil contempt, can the court inflict imprisonment as part of the punishment for said character of contempt?

Our Supreme Court, in the case of Edrington v. Pridgham, 65 Texas, 612, which was a case involving a question of civil or constructive contempt, say: "The proceeding for contempt

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can properly end only in a judgment of acquittal and discharge or conviction and sentence. The punishment is by fine or imprisonment, or both. (Rev. Stat., art. 1120; Rapalje on Contempts, sec. 128.) The proceeding is generally regarded as a prosecution for an offense. (Id., sec. 95; Passmore Williamson's case, 26 Pa. St., 7.) We know no authority for awarding in such proceeding, as a softer penalty, or as a means to the same end, a judgment in favor of the private prosecutor for a sum of money to be collected by execution. In some jurisdictions for contempt in civil cases, depriving a litigant of some right, the court is authorized by statute to require the offender to restore the *status quo*, or pay the damages, but the order is enforced by commitment. (Robbins v. Frazier, 5 Heisk., Tenn., 100; In Re. Day, 34 Wis., 638.)"

In his able work on contempts Mr. Rapalje says: "An examination of the authorities, English and American, discloses five different kinds of imprisonment for civil and criminal contempts: 1. Imprisonment in the first instance by way of punishment for a criminal contempt. 2. Imprisonment for the non payment of a fine imposed as such punishment. 3. Imprisonment for non payment of a fine or penalty imposed as a compensation to the person injured by the violation of an order or decree in a civil action. 4. Imprisonment to compel compliance by a party or witness with the requirements of an order or decree of the court; and, 5. Imprisonment for non payment of costs." Sec. 130.)

Again, the same learned author lays it down as a rule that "where a statute authorizes or prescribes the infliction of a fine as a punishment for contempt of court, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine is paid, although there be no specific affirmative grant of power in the statute to make such direction." (Sec. 129, p. 180; citing Fisher v. Hayes, 6 Fed. Rep., 63; Ex Parte Whittendon, 62 Cal., 534.)

In an able article on criminal contempts in the fifth volume of the Criminal Law Magazine, the distinguished writer, Mr. Seymour D. Thompson, says, with regard to imprisonment for the non-payment of a fine imposed as an indemnity to a party: "The principles governing this species of imprisonment appear to be, for the most part, substantially the same as in cases of imprisonment for the non-payment of a fine imposed as a punishment for a criminal contempt;" and with regard to this

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latter, he says that "unless otherwise provided by statute, the ordinary form of the judgment is that the party is committed to jail until the fine and costs are paid." A party committed for not paying a fine imposed on him for contempt must be confined within the walls of the prison. (People v. Bennett, 4 Page, N. Y., 282.)

But it is insisted in this proceeding that, the fine and imprisonment inflicted upon the officer being imposed for the purpose of securing and enforcing the payment of a debt due to the plaintiff A. A. Cooper, in the sequestration suit, is in contravention and violative of the eighteenth section of the Bill of Rights of the Constitution, article I, which declares that "no person shall ever be imprisoned for debt."

In the article of Mr. Thompson, above referred to, he says, speaking of this character of fines: "Such a fine is in no sense a civil debt." In Dickson v. The State, 2 Texas, 481, it is said the words "imprisonment for debt" had a well defined and well known meaning, and have never been understood or held to apply to criminal proceedings, nor to imprisonment inflicted as a punishment consequent upon a violation of the laws, and a contumacious refusal to submit to the pecuniary penalty imposed.

At page 174, 5 Criminal Law Magazine, Mr. Thompson says: "Since the abolition of imprisonment for debt in the United States, the idea of those contempts which are termed remedial contempts has come to be the refusal to do something which a party is adjudged to do, and which it is in his power to do. Even in remedial contempts of the mildest character there is, therefore, the essential idea of contumacy, wilful disobedience of orders and decrees made in the administration of justice. This is an offense against the administration of justice and against society. It hence implies criminality. This idea of criminality is so far a necessary ingredient of everything which is called a contempt that every contempt may be said to be a criminal contempt. It is necessary to consider this in order to understand what the courts mean when they say as they do, without discriminating as to the kind of contempt that contempts are crimes or misdemeanors, and that proceedings to punish contempts are criminal proceedings."

From the foregoing discussion we think it apparent, first, that the justice of the peace had statutory authority in this case to impose the fine of thirty-nine dollars and nineteen cents

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for the benefit of the plaintiff in the sequestration suit; that, secondly, said fine was also legally imposed as for a contempt of court, the officer having failed and refused to execute the process of the court. (Crow v. The State, 24 Texas, 612.) Thirdly, that, in addition to the fine, the court had also the authority to order and commit the officer to imprisonment until the fine and costs were paid.

The only remaining question for our consideration is whether the judgment, the order, and the commitment issued by the justice are valid and sufficient to authorize this imprisonment for said contempt.

It is well settled that, to justify the imprisonment of a party adjudged to be in contempt, an order or warrant of commitment of some sort is necessary. (Ex Parte Beaufort, 1 Cranch. U. S. C. C, 456.) "As to whether the order should contain a statement of the facts found in the proceedings prior to the commitment, the cases are in conflict. Thus, in New York, it is held that it must designate the particular misconduct of which the defendant is convicted. And in California it is laid down that it must state specially all the material facts on which the action of the court is predicated; and, where the commitment is for refusing to obey an order of the court, it must set forth that it is in the power of the person to comply with the order. Again, it has been said that a warrant to commit for contempt, issued by a limited authority, should show that the contempt fell within the limits of that authority, but that, when issued by a superior court of record, the adjudication of contempt may be general, and the particular circumstances need not be set out; that in such a case jurisdiction and regularity will be presumed. Again, it is held in New York that the process of commitment by a surrogate against a guardian for contempt need not recite all the facts necessary to confer jurisdiction. It should show, on its face, that it issued in a proceeding wherein the surrogate had jurisdiction; what was the cause of commitment; what act or duty must be performed, and what expenses paid." (Rapalje, sec. 129.)

"Either the order or judgment finding the defendant guilty of contempt in disobeying the command of the court, or the order of commitment for such contempt, must recite that it was in the defendant's power to perform the required act, or else the commitment will be void." (Id., sec. 137; see also 5 Crim. Law Mag., p. 520, sec. 40; Fischer v. Langbein, 103 N. Y., 84.)

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Syllabus.

Under these rules with regard to what is necessary to be stated in the judgment and order or writ of commitment, in such cases of constructive contempt as the one in hand, we must hold that an inspection both of the judgment and of the writ of commitment show them each to be wanting in the essentially requisite allegation that it was in the power of the defendant Robertson to perform the act required of him by the writ of sequestration issued to him for execution, to wit, that it was in his power to execute the same. Unless this matter sufficiently appears, it is beyond the jurisdiction of the court to render a judgment for such contempt; and, it being essential to the validity of the judgment, the judgment itself should recite the fact. Failing to recite this essential fact, the judgment is void.

As to the order or writ of commitment, it is open to the further objection that upon its face it shows the imposition of a fine as for a criminal contempt which, ostensibly, the court had no authority to inflict, and fails to recite all the facts necessary to confer jurisdiction upon the court to inflict punishment for a constructive contempt in the failure and refusal of the officer to obey the commands of the court.

Because the judgment finding the officer guilty of contempt, and the writ of commitment ordering his imprisonment are, each and both, void in law, the applicant, W. M. Robertson, is hereby released and discharged from further detention in custody on account of the same, and his discharge is ordered accordingly.

Ordered accordingly.

Opinion delivered May 15, 1889.

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No. 6244.

W. C. BIRD v. THE STATE.

1. ADULTERY is an offense which, under the present law of this State, can be committed in but one of two ways: 1, by the parties (one or both being legally married to some other person) *living together* and having carnal intercourse with each other; and, 2, by the parties having habitual carnal intercourse with each other without living together. To convict under the first mode the proof must show a *living together* of the parties, but need show no more than a single act of carnal inter-

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course, but under the second mode the carnal intercourse must be shown to have been habitual.

2. SAME—TERM DEFINED—FACT CASE.—"Living together," though not defined by the code, means within the purview of the statute defining adultery, that the parties "dwell or reside together; abide together in the same habitation as a common or joint residing place." The conviction in this case is for adultery committed by the first mode, but the evidence, failing to show that the parties *lived together*, although it proves habitual intercourse, is insufficient to support the conviction.

APPEAL from the County Court of Wise. Tried below before the Hon. W. H. Bullock, County Judge.

The indictment jointly impleaded the appellant and Ida Smith for adultery. The appellant, being alone upon trial, was convicted, and his punishment assessed at a fine of one hundred dollars.

The testimony shows that the defendant rented a certain house in Decatur which for a time was occupied by his co-defendant, Ida Smith; that he bought and paid for the furniture that was used in the said house, and that he bought and paid for supplies of groceries that were delivered at the said house. When he rented the said house he represented that he was renting it for other parties and not for himself. No witness testified that the defendant lived in the said house, but several testified that they had frequently seen him enter the house at night, and leave the next day, and on more than one occasion he was seen on the premises but partially dressed. Defendant was shown to be a married man, and that, until early in the year 1888, he lived with his family in Decatur, and that since he broke up house keeping, on the removal of his family to Fort Worth, he had boarded at the house of Mrs. Prigmore.

Graham & McMurray, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Two modes of committing the crimes of adultery and fornication are prescribed by the Penal Code of this State. 1. By the parties *living together* and having carnal intercourse with each other. 2. By the parties having *habitual* carnal intercourse with each other, *without living to-*

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gether. (Penal Code. arts. 333-337.) The articles cited became law upon the adoption of the Revised Code, and they changed materially the statutes then in force, relating to said offenses, and the changes made rendered inapplicable some rules and principles announced in decisions made under the former statutes. (Collum v. The State, 10 Texas Ct. App., 708.)

In the case before us, the defendant stands convicted of adultery, committed in the first mode named in article 333, by *living together* with one Ida Smith, and having carnal intercourse with her. To support such conviction it was essential that the State should prove not only that the parties had carnal intercourse with each other, but also that they *lived together.* A "living together" is not defined by the code. These words are, therefore, "to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed." (Penal Code, art. 10.) Guided by this rule of construction, we are of the opinion that the term "living together," as used in articles 333 and 337 of the Penal Code, means that the parties must dwell or reside together,—abide together in the same habitation as a common or joint residing place. This interpretation of the term is more restricted than has been given to it in decisions made under the former statutes. (Swancoat v. The State, 4 Texas Ct. App., 105; Parks v. The State, Id., 134.) But the former statutes prescribed but one mode of committing adultery, which was by the parties living together and cohabiting with each other. Carnal intercourse with each other, however frequent, did not constitute the crime unless the parties in some sort of way lived together. But as the law now is, *habitual* carnal intercourse, *without* living together, is adultery. It is plain to our minds, therefore, that in providing the two different modes of committing adultery, it was intended that the words "living together" should mean what we have above construed them to mean, and that, where the parties did not actually live, that is, dwell, reside together, they would still be guilty of adultery by having habitual carnal intercourse with each other. But, unless such intercourse was habitual, the parties not living together, adultery would not be committed; while, on the other hand, a single act of carnal intercourse, if the parties at the time lived together, would, under the law now in force, constitute the crime.

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Syllabus.

In this case, we do not think the evidence supports the conviction, in that it does not show that the parties *lived together* within the meaning of that term. If the defendant had been prosecuted for having habitual carnal intercourse with the woman, *without* living with her, the evidence would sustain a conviction, but he was not prosecuted or convicted for that kind of adultery, and we can not sustain his conviction for committing the crime in one mode, when the evidence shows that he did not commit it in that mode, although he may have committed it in the other mode.

With respect to the rulings and charge of the court we have found no error. Because the conviction is not supported by the evidence, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered May 18, 1889.

No. 6190.

J. T. WHITE *v.* THE STATE.

1. INJURING A FENCE.—To charge the offense denounced by article 683 of the Penal Code, the information or indictment must charge such acts of injury to property as do not come within the description of any of the offenses against property otherwise provided for in the Penal Code. The indictment in this case is formulated under said article 683, and charges an injury to a fence—an act which comes within the definition of two other offenses provided for in the Penal Code. (Arts. 684, 684a.) Exception that the acts charged constitute the offense defined in article 684 should have been sustained by the court.

2. SAME—CHARGE OF THE COURT.—On the trial the defense requested the court to instruct the jury as follows: "1. If you believe from the evidence of the witnesses that J. T. White had leased the farm of Watson for the year 1887, that he was for the time owner of said premises, and had the right to use the premises for his own convenience, so that he did not use them to the injury of another, and in the use of the same he had a right to open the fence for his own convenience. 2. Gentlemen, if you believe from the evidence that defendant cut the fence of Watson for his own convenience, and not maliciously for the purpose of injuring Watson, you will acquit. If you have a reasonable doubt as to defendant's guilt you will acquit." *Held*, that, being correct in principle, and embodying issues made by the proof, the refusal of the court to give said instructions was error.

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Statement of the case.

APPEAL from the County Court of Collin. Tried below before the Hon. M. W. Johnson, County Judge.

The opinion sets out the nature of the case. The penalty assessed by the verdict was a fine of one cent. The prosecution is dismissed because the indictment is bad in substance, but the ruling of this court upon the action of the trial court, in refusing the special instructions asked by the defense, necessitates a statement of the evidence adduced on the trial.

J. B. Watson was the first witness for the State. He testified, in substance, that he owned the place or farm in Collin county which the defendant leased and cultivated during the year 1887. That farm was enclosed by a good fence constructed of barbed wire in three strands, some of the supporting posts being eight feet, and others sixteen feet apart. There was a pair of bars near the house used in going into and out of the field with wagons and teams. In October, 1887, the defendant cut the said fence in two places, which materially damaged it, inasmuch as it could not be so spliced at the gap made by the cutting without leaving the wire slack. On cross examination the witness said that a good state of feeling did not exist between him and the defendant. Witness went to the house occupied by defendant and asked him why he cut the fence. Defendant replied that he had a right to cut it, whereupon the witness struck him. The ground was about as firm, even and good at the bars as it was at the places cut by the defendant, and the bars were at no greater distance from the house than the places cut. It had not been raining recently before the bars were cut, and the ground was not then muddy. Witness never heard of stock getting into that field.

E. A. Kirkland testified, for the State, that the fence around the Watson farm, occupied by the defendant in 1887, was cut in two places on or about October, 1887. The gap made by the two cuttings opened a wagon way out of the farm to the public road. Defendant said that he cut the gap in the fence for his convenience, as a way through which to haul his cotton and fire wood. Sam H. Graves testified, for the State, substantially as did Kirkland, and in addition that he saw the defendant cut the fence. It had been raining at the time of the cutting, and the ground was wet and muddy, but not so muddy at the gap opened by defendant as at the bars near the house.

John H. Watson, the son of the prosecuting witness, testified,

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for the State, that the ground, at the time the fence was cut, was in about the same condition at the gap opened by defendant as at the bars. Witness hauled some of the rent corn to his father's house through the gap opened by defendant.

The State closed.

T. W. Harrison testified, for the defense, that he worked for defendant on the J. B. Watson place in 1887; helped him gather his crop of corn and cotton, and to cut the gap in the fence mentioned by the State's witnesses. When he opened the gaps the defendant said that he did so because it afforded him a better course over which to haul his crops and firewood. A great deal of rain had recently fallen, leaving the ground wet, heavy and muddy. The ground was much muddier and heavier at the bars than at the gap made by defendant. The road through the bars passed over a large number of stumps, and to travel it in the field the defendant would have to drive his wagon over some of his growing cotton. Witness several times, before the cutting of the fence, helped defendant drive stock out of the field. The fence was a three strand barbed wire fence, the posts standing far apart and the wire very slack in places. Stock could get through that fence at almost any point.

R. C. White, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction was had under article 683 of the Penal Code, the indictment charging that the defendant did "wilfully and mischievously injure and destroy certain agricultural property, to wit: a certain fence which then and there surrounded and enclosed a farm belonging to J. B. Watson, said farm and fence then and there being in the possession of said J. T. White, who had rented the same from the said J. B. Watson, the said White being then and there the tenant of said Watson, the said Watson being the owner in fee of said land and fence, said injury and destruction being done in violation of article 683, of the Penal Code of the Revised Statutes of the State of Texas, and being done in such a manner as that the same does not come within any of the offenses against property otherwise provided for by said Penal Code."

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Syllabus.

Exceptions to the indictment were overruled, one of said exceptions being that the facts as charged constitute an offense under article 684 of the Penal Code, and are therefore not within the purview of article 682. This exception, we think, should have been sustained. The offense declared and made punishable by article 683, must be one that does not come within the description of any of the offenses against property otherwise provided for in the Penal Code. Injury to a fence comes within the description of two other offenses against property provided for in the Penal Code, to wit, the offenses described in articles 684 and 684*a*, and under one or the other of these articles any injury done to a fence must therefore be prosecuted, and not under article 683.

Under the issues presented by the evidence the court should have given the special charges requested by the defendant, they being correct in principle, and demanded by the evidence. (Hooks v. The State, 25 Texas Ct. App., 601.) The refusal of the court to give such instructions was excepted to by the defendant, and constitutes ground for reversal.

The judgment is reversed, and because the indictment is bad in substance the prosecution is dismissed.

Reversed and dismissed.

Opinion delivered May 18, 1889.

No. 2740.

Jack McDade v. The State.

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1. Murder—Manslaughter—Charge of the Court.—The proof shows that about one month before the homicide involved in this prosecution, the deceased killed one C., a relative of the defendant, and that the said killing resulted in creating relations of open and avowed enmity between the defendant and one S. on the one side, and the deceased on the other; that these relations became so strained and dangerous that mutual friends finally intervened and induced the parties to agree, on the part of defendant and S., not to molest the deceased, and on the part of deceased that, in visiting Hempstead, he would only carry his Winchester rifle in his buggy, or, if on horseback, in the scabbard to the saddle, and that any other mode of carrying the said gun was to be construed by defendant and S. as a declaration of hos-

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tility by deceased; and that threats uttered by either party were by the mutual friends to be reported to the other party. The proof further shows divers breaches by the deceased of the agreement as to the carrying of the gun, and frequent threats of a deadly nature uttered by deceased, some of which were communicated to the defendant and S. The inculpatory proof shows that, when shot, the deceased was sitting on his horse, with his gun across his lap, and his back toward the place from whence he was shot, and that, so far as was apparent, he was unconscious of the proximity of any person save those to whom he was talking, that he fired no shot, and that he made no motion to seize his gun, at least until immediately before he was fired upon, when he was warned by a bystander to "look out;" that a few minutes prior to the shooting the defendant and S., from a short distance, remarked deceased's presence, and immediately, by a circuitous route, and through an alleyway, approached to within a few feet of the deceased, and opened fire upon him from behind him, with fatal effect, and continued to shoot him while in the death agony. The defendant produced testimony to the effect that he and S. went to the place of the killing in the manner they did to execute a warrant for the arrest of a desperate criminal, who was reported to them to be at that place, and that their coming upon the deceased was sudden and wholly unexpected. Upon this state of proof the defendant claims that, by reason of the recent threats and acts of the deceased, in violation of the agreement, and their sudden and unexpected discovery of him with his gun carried contrary to the agreement, they were confronted with such appearance of danger as was calculated to arouse, in men of ordinary temper, such emotions as would render the mind incapable of cool reflection; and upon this theory he demanded of the court the submission to the jury of the issue of manslaughter. *Held* that the proof did not present, and the trial court did not err in refusing to submit to the jury the issue of manslaughter, because the evidence does not establish "adequate cause," nor show any purpose on the part of the deceased, when killed, to execute threats previously made by him.

2. SAME—SELF DEFENSE.—See the statement of the case for a charge of the court on the issue of self defense, *held* sufficient under the evidence adduced; and see the opinion for requested instructions on the same question *held* to have been properly refused as unwarranted by any proof in the case.

3. SAME—REASONABLE DOUBT.—Upon the doctrine of "reasonable doubt" the trial court charged the jury as follows: "The defendant is presumed to be innocent until his guilt is established by the evidence to the satisfaction of the jury beyond a reasonable doubt"—omitting the statutory word "legal" before the word "evidence." *Held*, that the omission was immaterial, and the instruction in substantial compliance with the statute.

4. SAME—EVIDENCE.—In the examination of his own witness the defendant proved the declaration of deceased to the said witness, that defendant had uttered threats against him, deceased. Defendant requested the court to charge the jury that such declaration of the de-

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Statement of the case.

ceased could not be considered by them as evidence that such threats were made by the defendant. *Held* that, having himself elicited the adverse testimony, the defendant could not he heard to complain, and the court did not err in refusing the instruction.

5. MURDER—FACT CASE.—See the statement of the case for evidence *held* sufficient to support a conviction for murder in the second degree.

APPEAL from the Criminal District Court of Harris, on change of venue from Waller. Tried below before the Hon. C. L. Cleveland.

This conviction was in the second degree for the murder of S. W. Allchin, in Waller county, Texas, on the twelfth day of May, 1888. The penalty assessed against the appellant was a term of eight years in the penitentiary.

William Cameron was the first witness for the State. He testified that he lived in Waller county, Texas, about seven miles east of the town of Hempstead. He was in Hempstead on the morning of May 19, 1888, and witnessed the killing of Allchin by the defendant and Dick Springfield. It occurred between ten and eleven o'clock on that morning. At the time that the first shot was fired the witness was standing in front of the south door of Fritz Zeisner's saloon. At that time Haveman & Co. occupied the south corner store of the block. Zeisner occupied the next building north. Pointer's store was the building north of Zeisner's, and Cole's drug establishment was the next. The next store was Keiser's; the next was Schwartz's, and the next was the north corner of the block, into which Haveman & Co. had removed since the homicide. The south corner of that block is the corner hereafter referred to as Haveman's corner. While standing at Zeisner's south door, as stated, talking to Mr. Joe Nast, the witness heard the report of a gun fired from a point near him. Looking in the direction whence the report came, the witness saw Dick Springfield with a shot gun in his hands, standing near the southeast extreme of Haveman's corner. Turning to his left, the witness saw Allchin, sitting on his horse, about eight feet distant from where witness was standing. Allchin had been shot in the arm and in the left side behind the arm. He was then leaning his body slightly forward on his horse, holding a bridle rein in each hand and kicking his horse. His Winchester rifle was across his saddle between his body and the pommel of the saddle. The first step or two of the horse caused Allchin to slacken his

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grip on the bridle, when the horse wheeled to run. About that time Springfield fired again, and when the horse had taken twenty or twenty-five steps the defendant fired with his shot gun, and Allchin fell off of his horse on the right hand side, his gun falling partially under him and to his left. Springfield and defendant then ran to the body, when Springfield fired three shots into it with a pistol, and defendant three other shots with a pistol and one with a shot gun.

After firing the seven shots as stated into the prostrate body of Allchin, the defendant and Springfield reloaded their shot guns, which were breech loaders, and walked west, twenty or twenty-five feet to the pavement. Upon reaching the pavement defendant pointed to several parties standing in front of Pointer's store, and said: "All those men" or "all those sons of bitches ought to be killed." The witness went to Allchin as soon as defendant and Springfield left him, remained but a moment, and then went to a point on the street about opposite Keiser's store. By that time defendant and Springfield reached the north corner of the block, where they met defendant's uncle, Sheriff Thomas S. McDade. Defendant exclaimed to Captain McDade: "Uncle Tom, we got him." Witness then turned and went back to Allchin, who had ceased to breathe since witness left him a minute or two before. Quite a crowd had now collected about the body. Bob Pointer, who was very much excited exclaimed: "Here lies his gun," and took hold of it but dropped it when advised by somebody present not to handle it. The said gun, which witness then observed, was in the condition in which Allchin usually carried it. After falling off his horse Allchin raised his head as high from the ground as he could raise it without moving his body. The body had been turned over when the witness went to it the second time, and witness for the first time saw that the face had been shot off from the chin to the eye brows. He lived not exceeding five minutes after he was shot. The witness and Allchin were about eight feet apart when the shooting began, Allchin sitting on his horse, which faced a little north of west, and thus placed him to the left of witness. The street extended north and south. Witness had just stepped away from Allchin when the first shot was fired, and at that particular time was talking to Joe Nast. The witness was standing on the sidewalk, and Allchin's horse was as near to the sidewalk as he could get, and was standing still. Defendant and Springfield, when witness

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first saw them, were a little southwest from Allchin, Springfield five, six or seven feet north from the corner of Haveman's store, and the defendant three or four feet north from that corner. They were standing about thirty-five feet distant from Allchin. They were "to the side of Allchin and a little back of him." The witness did not see the defendant until the first shot was fired. The first three shots were fired from shot guns, two of them by Springfield and the other by defendant. The other shots, except one fired by defendant into Allchin's body after it had fallen, were fired from pistols in the hands of defendant and Springfield.

Continuing, the witness said that the first shot was fired within three minutes after he spoke to Allchin, and had stepped off and joined Joe Nast. When the witness spoke to Allchin, the latter had his Winchester gun across his saddle, the muzzle pointing a little southwest, and it was in that position immediately before the shooting. He was not facing the direction whence the shots were fired. His left side was towards defendant and Springfield when the first shot was fired, and his back was towards them when the second shot was fired, his hands still grasping his bridle reins. The witness could not see Allchin's hands after the second shot, but saw that he continued to lean forward until he fell. His gun was balanced across the saddle until it fell with him, off the horse, on the same side. The witness could and did see Allchin's face as he fell off his horse. It had not then been shot. After shooting into Allchin's prostrate body and reloading their shot guns, defendant and Springfield walked along the pavement to the north corner of the block, where they met Sheriff McDade. Witness saw no person other than Sheriff McDade with defendant and Springfied after the shooting. Springfield at that time, was a deputy sheriff under Sheriff McDade. Witness knew that defendant was a nephew of Sheriff McDade, but did not know that he was a deputy sheriff.

Cross examined, the witness said that it was generally reported and generally conceded that about a month or six weeks before his death, Allchin killed one Chambers, a son-in-law of Sheriff T. S. McDade, the uncle of this defendant. The killing of Chambers by Allchin was understood to have occurred in Waller county. Allchin had never talked to witness about the killing of Chambers. The witness knew nothing whatever about the existence of a political feud in Waller county at and

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before the time of the killing of Allchin. He did not know, as a matter of fact, that defendant and Allchin were members of rival political clubs. He had heard of the existence in Waller county of two antagonistic parties, but was unable to say whether the nature of said parties was political or not. He had heard that the "parties" were at enmity with each other; that "they were on different sides, and took different positions," but he could not say whether this division was on private or public questions. Witness did not on the fatal morning, before the shooting, see Allchin at the railroad depot, and on the platform displaying his Winchester. The witness had no conversation with Allchin just before the shooting, but merely passed the usual salutation of a friend, and passed on to Zeisner's saloon, got a glass of beer, stepped out and was talking to Nast when the shooting occurred. Witness did not see the defendant and Springfield when they reached the point on the sidewalk from where they fired the fatal shots, but he could have seen them had he then been looking that way. Witness saw Springfield at the firing of the first shot, and he was then standing on the sidewalk about ten feet from the corner. He did not observe the defendant or the deceased immediately before the first shot was fired, and could not say what they were doing at that particular moment. Immediately after Springfield fired the first shot, witness looked and saw that he had shot Allchin through the arm and side. Witness plainly saw the bullet or buckshot holes in Allchin's coat. Allchin's horse had gone fifteen or twenty feet when defendant fired his first shot. The witness did not hear what reply, if any, Captain McDade made to defendant's exclamation: "Uncle Tom, we got him." The witness was not a member of any political club of which Allchin was a member. Witness had heard that Allchin had had a body guard, but he was not a member of that guard.

On re-examination the witness said that all he knew of the existence of Allchin's body guard was what he had heard as current rumor in the neighborhood. Chambers, the son-in-law of Sheriff McDade, who was killed by deceased about six weeks before the latter's death, was a deputy sheriff under Sheriff McDade. Deceased was a teamster by trade and held no official position at the time of his death. If he belonged to any club or other political organization, the witness was not aware of it. When witness's attention was first directed to defendant and

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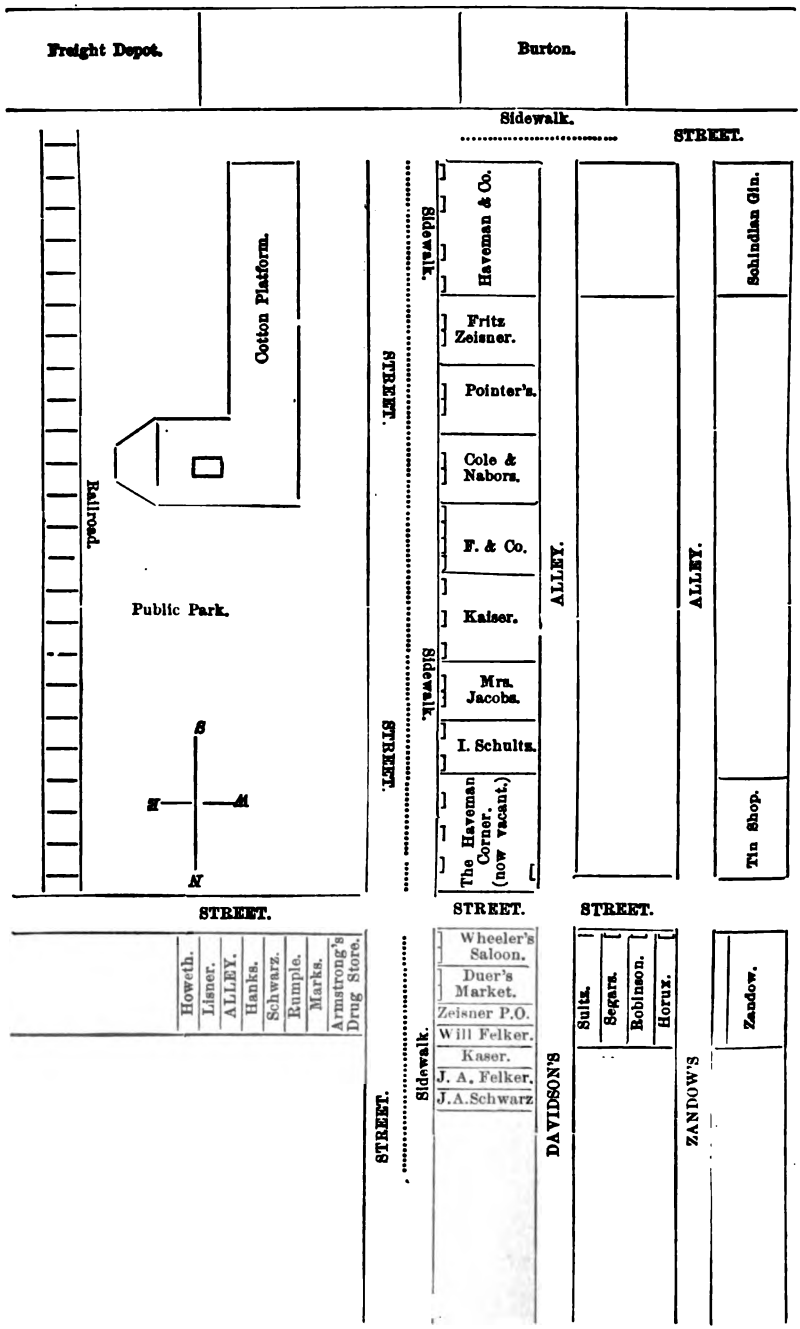
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Springfield immediately before the shooting, they had their guns in a shooting position, defendant standing somewhat to the rear of Springfield. Allchin did not raise or attempt to raise his gun from the time that Springfield fired the first shot until he fell off his horse.

The plat of that part of the town of Hempstead contiguous to the place of the homicide was put in evidence at a later stage of the trial, but for convenient reference it is here inserted.

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C. D. Robinson was the next witness for the State. He testified that he lived in the town of Hempstead, Waller county, and was engaged in the mercantile business. His store faced south and was about one hundred feet distant from the alley on which the corner of the Haveman store rested. While standing in his store door on the morning of May 19, 1888, the witness saw the defendant and Dick Springfield, each armed with a shot gun, step out of the side door of Wheeler's saloon into the alley. They went south from witness's store. About the time they could reach the place from which the fatal shots were fired, the witness heard the shooting, and soon saw Allchin's horse "run up." To get to that place the defendant had to go the width of a street and the length of a block. Leaving the saloon, defendant and Springfield went in a southwest direction until they struck the alley next to Haveman's corner, when they went south. "To bring them to the Haveman store they would have to go due east, and to bring them to Haveman's (corner?) they would have to go north." They walked rapidly and appeared to be in a hurry, carrying their guns at their sides. Witness heard the defendant cock his gun as he entered the alley. Witness next saw defendant and Springfield in the street between his, witness's, store and the Haveman block. That was about five minutes after the shooting. Springfield exclaimed: "If there is any damned scoundrel who wants to take up the fight, come out in the street! Come on, boys, let's go over to Wheeler's and take a drink." Three or four parties were then with defendant and Springfield, but witness did not know who they were. Sheriff McDade soon afterwards joined the party.

Cross examined, the witness said that he did not see Allchin on the day of the homicide, either before or after he was killed The first time witness saw Allchin, to know him, was about a week before the killing, when he saw him passing on the street. Allchin, after that, came into the witness's store. Witness knew nothing about Allchin being on the platform at the railroad depot on that morning, flourishing his Winchester. Witness did not see defendant and Springfield after they passed into the alley, until a very few minutes after the shooting, they appeared on the street, and Springfield called on the "boys" to go to Wheeler's and get a drink. It was the opinion of the witness that the killing of Allchin was a result of the previous killing of Chambers. The community about Hempstead was a

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peculiar one at the time of the killing of Chambers and Allchin. Since the killing of Allchin the witness had been elected justice of the peace, and the community was not now so peculiar. Witness anticipated trouble when he saw defendant and Springfield step out of Wheeler's saloon into the alley with their shot guns. After his election to the office of justice of the peace the witness held the inquest upon the body of T. S. McDade, who was sheriff of Waller county at the time of this homicide. T. S. McDade, and another member of the McDade party, were murdered in cold blood—assassinated at night The witness, at this point, was asked if it was not a matter of public notoriety that the killing of T. S. McDade, Louis McDade, a colored man, and Chambers, was a part of the same feud? He replied that he had never heard that the killing of Louis McDade was a part of that feud.

Re-examined, the witness said that Louis McDade was murdered after the killing of Allchin and just before the election in 1888. Chambers was killed by Allchin about a month or six weeks before he was killed. He was wounded by Chambers at the time he killed him, and when killed himself was at liberty on bail. The killing of Chambers, as the witness understood and believed, grew out of an article published in the Advance Guard newspaper. That article reflected very severely upon a recent grand jury of Waller county and upon the Waller county officials. The said officials very bitterly resented the said publication. Witness understood that Allchin proclaimed himself to be the author of that article. Witness did not hear politics mentioned in connection with the killing of Chambers. Witness knew of no political organization at the times of the several killings. He did not know how long it was after the killing of Chambers when Springfield was appointed deputy sheriff, but it was only a short time.

R. B. Pointer testified, for the State, that he lived in Waller county, Texas, and followed the business of merchandising in Hempstead, and farming in the country. He came to the store on the fatal morning and hitched his buggy and horse in front of Haveman's store. While leaning on his show case making out a bill against a negro, the witness heard a shot. Looking up instantly he saw Allchin's horse wheel and run from in front of Zeisner's store, with Allchin, bare headed, on his back. Another shot was fired and Allchin fell. A few minutes before the first shot was fired the witness saw Allchin sitting on his

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horse in front of Zeisner's store, with one leg around the pommel of the saddle, and his Winchester across the saddle between his body and the pommel. He still had the gun in that position when the horse fled from Zeisner's store, and when he fell off. He made no attempt to raise his gun that witness saw, but witness did not observe him just before the first shot was fired. The distance between the point where witness was standing and that where Allchin was sitting on his horse when the shooting began, was between fifteen and twenty-five feet. Witness did not see who fired the first two shots, but after they were fired, and Allchin fell, witness went to his front door and saw defendant and Springfield step off Haveman's gallery, armed with shot guns. At that time Allchin was lying on the ground working his head from side to side. His face, which witness plainly saw, was then perfectly natural, but defendant and Springfield walked up to his body, and fired several shots into his head, and when witness next saw Allchin, a few minutes afterwards, his entire face was shot off. Defendant and Springfield fired into the body at the same time, but witness thought that Springfield shot the face off with a shot gun. Defendant had a pistol as well as a shot gun, but witness saw no pistol in Springfield's hands. Immediately after discharging the shots into deceased's body, Springfield stepped to the sidewalk in front of Armstrong's drug store, and exclaimed: "This is the way we treat men who murder men on the streets." Defendant then said: "There are some other sons-of-bitches down this way that ought to be murdered." The parties thus referred to were parties then in witness's store. John and Jo Peebles, Dick Kimball and Bozeman then stayed in witness's store. The witness knew the defendant very well, but had only a slight acquaintance with Dick Springfield. About the time defendant made the above remark, he walked on up the street, and the witness re-entered his store. He remained in his store but a minute, and then went to Allchin's body. Allchin was then lying with his face to the ground, and was breathing his last breaths. Phil Duer told witness to turn the body over, which the witness did. The witness then picked up Allchin's Winchester, which was lying on the ground with the butt near Allchin's feet. The slide of the gun was pushed back, and there was sand in the slide at the place where the "plunger" works. Witness examined the gun and put it back where he got it. The lever was up about an inch. It was an old gun with a loose

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guard. At the very moment the first shot was fired the witness looked up from his show case and caught sight of Allchin, his horse then being in the act of wheeling. Witness could not tell the position in which Allchin had his hands at that very moment. The witness did not see the first two shots fired, and did not know, of his own knowledge, from what point they were fired. It looked to him like the other shots were fired at Allchin's back as his horse ran off.

Cross examined, the witness said that he thought it was the left leg that Allchin had around the pommel of the saddle, when he observed him just before the shooting, but he was not absolutely certain that it was not the right leg. Witness did not see the deceased on the depot platform that day, nor did he see him come to town from the depot. He did not know how long deceased had been in front of Zeisner's saloon when he was shot. Witness did not, prior to the shooting, see a man on the corner at Haveman's store whom he did not know. He saw a well dressed stranger on that corner about twenty minutes after the shooting. Witness took that man to be a drummer who had been soliciting trade from Haveman. That man was not Claude Loraine. Drays, carts, etc., traversed the alley next to Haveman's corner, but witness knew nothing about the character of that alley—whether a public or private thoroughfare. The distance between the railroad depot and Haveman's store was between one hundred and twenty and one hundred and fifty yards. The witness's store was next to Zeisner's, but witness did not go into Zeisner's on that day, nor did he know whether or not there were any guns in Zeisner's place on that day. Witness could not say how long it was before the first shot was fired that he last saw the deceased, but it was not longer than a minute and a half. He then had his leg across the pommel of the saddle. Witness did not know when the deceased took his leg from around the pommel of the saddle. When witness saw Springfield and defendant advancing upon deceased, Springfield was one or two feet in advance of defendant. Springfield, when he reached the body, fired into the head with a shot gun. Witness was quite positive that it was Springfield and not defendant who emptied the shot gun into Allchin's head after he had fallen. It was the opinion of the witness that Allchin received the fatal wound when he fell from his horse, which was at a point in the street near the front of Zeisner's south door. Witness did not notice but one man

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on the street when he started to the body after the shooting, but there might have been as many as a hundred men on the street at that time. A large crowd was present when witness turned Allchin's body over. Phil Duer was with defendant when witness first stepped into the street after the shooting. As defendant and Duer started up the street the witness stepped into his store. He stepped out again almost immediately, was joined by Phil Duer, and the two went together to Allchin's body.

Further cross examined, the witness said he knew nothing of an agreement to which Allchin was a party, and which bound him not to carry his Winchester gun on the street. He did not know whether or not Allchin was an expert in the use of a Winchester gun. He had known Allchin for eight or nine years, and during the last seven or eight months of Allchin's life had never seen Allchin without his Winchester. He had no recollection of ever seeing deceased carry a gun prior to the time alluded to, seven or eight months before his death. The witness did not belong to any political club or organization which, at that or any other time, was on what was termed the "Steve Allchin side of politics." Witness had never heard of such a club or political organization until, soon after the killing of Allchin, he was attached as a witness for defendant and Springfield. Claude Loraine then told witness about such an organization, and witness had never heard anything more about it. Witness knew, at the time of the killing, that for some days or weeks Allchin had harbored in his house a body of six or eight men who were said to constitute a "body guard" for the said Allchin. He knew also of public or political meetings that were held during the three or four months preceding the election of 1888, and that Zeisner's place was the headquarters of that faction, but he never attended any of those meetings, and knew nothing about them, except that they were held. The trouble which culminated in the Allchin and other killings grew out of an article that was published in a newspaper reflecting severely on the "court house" officials. Witness was not in Hempstead when the first of this series of killings occurred, and it was by mere chance that he came to town on the day that Allchin was killed. He did not know that the purpose of the political meetings arranged or held at Zeisner's was to organize for the defeat of Captain T. S. McDade, who was then running for re-election as sheriff. Witness knew

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Captain T. S. McDade well, and knew him as a good citizen, kind hearted and generous, and as quiet, peaceable and law abiding a man as lived in Waller county, or any other county in Texas. Captain T. S. McDade was assassinated, in the night time, six or seven months after the killing of Allchin, and it was not known who murdered him. Allchin had on a black coat when shot, and the witness was satisfied that he saw the shot strike him; at all events, he witnessed the sudden appearance of white spots on the coat immediately upon the firing of one of the shots. The sidewalks in front of Haveman's block, and along the line of that street, were constructed of plank. A man walking along them would not necessarily make a noise. Witness did not know that defendant and Springfield approached Allchin on the sidewalk.

On re-examination the witness said that Captain McDade had been sheriff of Waller county, at the time of the Allchin killing, for eight or ten years. He was nominated for re-election in 1888 on the Republican ticket, but withdrew from the race, and finally resigned the office before the election. Witness did not hear of the rival political organizations until October, 1888. He did not remember whether Captain McDade had then resigned the sheriff's office, nor did he remember whether, at that time, Captain McDade was running as the Republican nominee or whether Mr. Faulkner had been substituted. The race for that office was finally made by Mr. Faulkner as the nominee of the Republican party, and Captain Allsburn as the nominee of the "People's" party. The witness knew nothing whatever about the organization of the two political factions or parties. The witness did not know who defendant referred to when, just after the shooting of Allchin, he pointed towards witness's store and said that "there are other sons-of-bitches who ought to be murdered." It was possible that he referred to witness for one. Witness's brother-in-law, Mr. Peebles, was then an announced candidate for sheriff of Waller county. Allchin owned and "run" teams as a business. At that time his teams were at work at a point between two and four miles northwest from Hempstead. He lived about a quarter of a mile south from Hempstead. The parties who stayed about Allchin's house were his teamsters.

On his re-cross examination the witness said that he did not know whether Christy Williams, Floyd and Davidson, or either of them, were in the employ of deceased, just before his death,

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as teamsters. He had never seen either of those parties about deceased's place. Witness had reason to believe or know that defendant, at the time Allchin was killed, wanted to hurt Jo Peebles, a brother-in-law of witness, and a candidate for sheriff. It was the public understanding that Captain McDade resigned his position as sheriff in response to a petition, and for the purpose of harmonizing conflicting elements. Jo Peebles was a withess for Allchin in his pending trial for the killing of Chambers, and he, Peebles, had told witness that, in killing Chambers, Allchin acted in self defense. Allchin was himself wounded in the fight with Chambers.

Dr. L. W. Groce, testifying for the State, described the twenty-seven wounds he found on the body of the deceased, and declared that of the said wounds those that penetrated the body in the region of the left kidney; those that penetrated the breast bone; the one that entered at the left eye, and those that passed out of the back of the head were necessarily mortal wounds. The face was horribly mutilated and almost entirely shot away. The said wounds were made by buck shot and bullets.

William Leary testified, for the State, that he lived in Waller county, Texas, about three and a half miles from Hempstead. He was in Hempstead on the morning of the fatal day, and imperfectly saw the killing of Allchin. When witness was driving past Fried's store, which was beween Armstrong's drug store and the place of the killing, he was hailed by a friend and stopped. While talking with his friend the shooting commenced, the parties doing the shooting being behind, and not within the view of witness at that time. He caught sight of Allchin just after his horse turned, and did not see the parties until after Allchin fell, when they came into the street. Both of those parties were strangers to witness, and witness could not now identify either one of them. He heard Allchin, after his body struck the ground, exclaim: "Don't shoot any more." The witness saw only one of the two parties shooting. Both parties had guns, and the one who did no shooting was a few feet behind the other. Witness was at the back of his wagon, ten or twelve steps distant from Allchin when the latter fell. When witness first observed Allchin, just before the shooting commenced, he was sitting on his horse in front of Zeisner's saloon, facing that saloon. He seemed to be holding the bridle reins with a strong grip. His side was then presented

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to the witness. He was carrying his Winchester gun either across his lap or across his saddle, between his body and the pommel. Witness did not again observe the gun when it and the body fell from the horse together. As the witness thought himself within the range of the shots, he left his wagon without taking note of the number of shots fired. The witness did not hear any of the parties say anything before the shooting began, and if he heard anything said afterwards he did not now remember it.

Cross examined, the witness said that he was standing behind the wagon in the street when the first shot was fired, was standing there when Allchin passed him, and stood there until Allchin fell off his horse, when he ran into Fried's store. Allchin had struck the ground and was feebly moving his head when he exclaimed: "Don't shoot any more." The friend to whom witness was talking when the shooting commenced was W. B. Peebles. Witness's back was towards Allchin when the first shot was fired, and he was unable to say what Allchin was doing at that particular time.

Mrs. Brent Brown, wife of James Brown, testified, for the State, that she was in Hempstead on the fatal day and witnessed the killing of Allchin. She, her husband and sister-in-law went to Hempstead in a wagon. The wagon was stopped in front of Haveman's, and in front of and thirty or forty feet from Armstrong's drug store, into which drug store the witness's husband went. While sitting in the wagon waiting for her husband, witness observed Allchin talking to a gentleman whom she could not well see. Allchin was sitting on his horse, with his right hand on the pommel of the saddle and his left arm hanging down. He faced north with his right side presented to witness. His general appearance reminded witness of an acquaintance who lived in her neighborhood, and she remarked to her sister-in-law: "That man looks like Tom Wellingford." At that instant the first shot was fired, and Allchin turned to face the witness and her sister-in-law. The horse started off, the firing continued, and Allchin and his gun fell off the horse together. Witness did not see the parties who fired those shots, but saw that Allchin had nothing in his hands at the time the shots were fired. Witness heard at least two shots after Allchin fell. She saw two parties with guns after Allchin's fall, but saw none of the shots fired.

Mrs. Kate Wright testified, for the State, as follows: "I was

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at Mr. George Burton's house in Hempstead at the time Steve Allchin was killed. I was down stairs in his residence. I saw two men come out of the back alley behind Haveman's. They came out of the south end of the alley and went up the south side of the block, and then stepped on the side walk in front of Haveman's store. They had guns, and when I first saw them one of them had his gun on his shoulder. I saw them last when they stepped up on the side walk in front of Haveman's store. I then turned to call one of my cousins to come and tell me who they were. Just as I turned around I heard shooting and it sounded like it was around at Haveman's. It did not seem to me more than a second from the time they got on the side walk until the shooting commenced. Those men walked fast. I did not see them at the time of the shooting, nor I did not see Allchin. I was not in a position to see them at that time."

B. Scheuler testified, for the State, that just before the killing of Allchin, he had occasion to pass along the pavement in front of Wheeler's saloon, at the corner of which pavement he stopped. In going by the front door of that saloon, he passed the defendant and Springfield, who were standing on the pavement talking to a third party. Just as witness stopped at the end of the pavement he looked back and saw defendant and Springfield cross the street in a southwesterly direction towards the alley mentioned by previous witnesses, beyond which witness did not for a time see them. They walked fast and each of them had a double barreled shot gun. Witness went on his way, and when he reached I. Schwartz's corner, about three minutes later, he heard the shooting, and came within view of Allchin just as he fell off his horse. A few minutes later he heard defendant exclaim, as he passed Armstrong's drug store: "I reckon we got them this time!" His tone of voice was somewhat boisterous, and he appeared to address no person in particular.

Fritz Zeisner was the next witness for the State. He testified that he was the proprieter of a beer saloon and a grocery store at the time that Allchin was killed. He was inside of his said establishment, and from his position in there he saw Allchin when he fell from his horse. He did not see the firing of the first shots, but saw defendant and Dick Springfield when they fired into Allchin's body after he had fallen. Allchin, for a while before and at the time he was shot, was sitting on his

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horse in front of the south door of witness's said saloon. He was facing the gallery, looking up and down the sidewalk a few moments before the shooting, and when the first shot was fired he was talking to Gus Miller and some other parties, and was shaking hands with somebody. He had his bridle reins in one hand, and a Winchester gun across his lap. He made no attempt to raise that gun either before, at or after the firing of the first shot. Immediately upon the firing of the first two shots Allchin's horse sprang forward, made two or three jumps, covering about fifteen feet, and Allchin and his gun fell off on the same side. Defendant and Springfield ran at once to the body and fired several shots into it. They ran to the body from around the south door of witness's store. Witness's said store was north of Haveman's store, and they came from the direction of Haveman's store. Both defendant and Springfield had a shot gun and pistol. As they came on the gallery, going to where Allchin was lying on the ground, witness thought they were coming into his store. He accordingly retreated, and heard nothing that was said by them or anybody else after the shooting.

On his cross examination, the witness said that if a gun and sixteen loaded shells were placed in his store on the fatal day by Christy Williams he, witness, did not know it. He saw no such gun or shells then or afterward. The killing of Chambers by Allchin occurred at the corner near witness's store. Witness saw it, and was then under process to attend Allchin's trial as a witness in his behalf, and it was because of that fact that he feared for his life at the hands of defendant and Springfield, and ran when he saw them coming toward his store on their way to where Allchin was lying in the street. The political club or organization that was opposing the re-election of Sheriff T. S. McDade had its headquarters and meeting place in the hall above the witness's store, but said organization got permission to use that hall from the hook and ladder fire company, which rented it from witness. The witness attended several of the meetings of that organization in that hall, and knew that Winchesters and six shooters were frequently carried into those meetings. The said organization met sometimes in the afternoon and sometimes at night. Witness denied that when Eli Browning came to him and said: "All the McDades should be killed," he replied: "Yes, and the women too." Christy Williams was in town on the fatal morning with a cart load of

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flour, but he did not, nor did anybody else, take a shot gun into witness's store and leave it, or, if they did, the witness did not then nor now know that fact. Witness did not find a gun and cartridges in his store on that day, and he did not get a gun from there or anywhere else on that day and give it to any person. Allchin rode up to the front of witness's store, stopped and sent a negro into the store with some money to be changed. Witness changed it and sent the change back. In a very short time the shooting occurred,—before the party handed the change to him.

At this point witness was asked if he did not testify on the examining trial that Allchin was shot when the party was in the act of handing him the change. He replied that he did not see the negro hand Allchin any change, because the shooting began just as the negro stepped out of the store. The witness now states that Allchin's right hand was on the pommel of the saddle when the first shot was fired. His written statement on the examining trial represents him as testifying then that he did not know where Allchin's right hand was. Witness did not undertake to explain the conflict between his two said statements. It was either Nast or Miller, but witness was not positive which, that Allchin was talking to when the first shot was fired. The killing of Louis McDade occurred about twenty steps above the witness's place of business. Witness saw the said Louis four or five minutes before he was killed, but he did not see and did not know who killed him. Chambers was killed about one month before Allchin was killed, and witness was known to be a witness for Allchin with reference to that killing. and it was for that reason that, at the time of the killing of Allchin, he was afraid of guns in the hands of Springfield and the defendant. Witness denied that on the Monday after the killing of Allchin he told A. T. Bedell or anybody else that he was behind his counter and knew nothing more about the killing than that he heard the guns and saw Allchin fall off his horse. The political club which held its meetings in the hall above the witness's store was a club of the Democratic or People's party, in opposition to the Republican party. It was organized after the killing of Allchin, and for the campaign.

Gus Miller was the next witness for the State. He testified that he was in Hempstead on the fatal morning, and witnessed the killing of Allchin by the defendant and Springfield. Seeing Allchin on his horse in front of Zeisner's, south door, the

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witness stepped and shook hands with him, Allchin leaning forward and resting one hand on the pommel of his saddle. Having shaken hands, witness stepped back, or rather turned his body to face the same way Allchin was facing, which was north. About that time somebody exclaimed: "Look out!" Witness turned around and saw defendant and Springfield, armed with shot guns, on the gallery in front of Haveman's store, about six feet from the southeast corner. Witness stepped back quickly at about the moment two shots were fired. Allchin's body, when the person exclaimed "look out," was "quartering just a little back," and he was facing up the street, north. Witness could not say in which direction he, Allchin, was looking at the precise time the two shots were fired. He had his Winchester rifle across his lap between the pommel of the saddle and his body, and, when witness last observed him before the shooting, one of his hands was on the pommel. The first time witness looked at Allchin after the warning to "look out" was as the fourth shot was fired, when he, Allchin, fell off his horse. His gun fell with and partly under his body. Defendant and Springfield then walked to where he was lying and fired other shots into his body. Allchin at no time, either before or after the shooting commenced, raised or attempted to raise his gun so far as the witness saw. George Burton shook hands with Allchin just before the shooting.

Cross examined, the witness said that when he first saw and spoke to Allchin on that morning—which was just before the shooting—he, witness, had just come out of Haveman's store. Allchin was shaking hands with Cameron when witness joined him. He then shook hands with witness and then with Burton. As soon as he had shaken hands with Allchin, witness turned his face to look north up the street, and a few seconds later he stepped off a few feet, and was thinking about where he could find a purchaser for produce he had brought to town, when he heard the warning "look out!" Witness did not know where Fritz Zeisner was when the warning was spoken nor when the first shot was fired. Defendant and Springfield advanced upon Allchin after he fell, passing the witness on the side walk between the two doors of Zeisner's establishment. Zeisner came out of his store after defendant and Springfield had passed, and kept pulling at witness to leave until witness did leave. Witness did not know where Zeisner was when the first shot was fired.

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Describing the occurrences immediately preceding the firing of the first shots, George Burton, a witness for the State, testified that he saw Allchin in front of Zeisner's saloon, on horseback, talking to either Nast, Cameron or Miller, all of whom were present. He was facing north or northwest, exposing his side to the south. Witness shook hands with him and stepped away. As witness started off he saw the defendant and Springfield on Haveman's pavement or sidewalk. One of them was aiming a gun and the other was raising a gun to his shoulder. Witness exclaimed "look out!" and sprang out of the way, when the firing began. He saw Allchin after he hallooed "look out!" and Allchin was then leaning forward on his horse, but witness could not say in what position his hands then were. He made no effort at any time, so far as witness saw, to raise his gun. Allchin's horse made two or three jumps after the first shots were fired, and Allchin fell off, when defendant and Springfield advanced upon him, and witness saw defendant fire one or two shots into the prostrate body. He did not hear either defendant or Allchin say anything after Allchin fell. Witness saw Springfield before the shooting at Wheeler's corner, and again between Jacobs's and Kaiser's places, going north. He was then alone and the witness thought had been down the Haveman block as far as Fried's, in search of and to arrest a man that Loggins was after. Springfield then had no gun. The shooting occurred fifteen or twenty minutes after the witness saw Springfield between Jacobs's and Kaiser's.

John Peebles, a clerk in Pointer's store, was the next witness for the State. His statement of the fatal transaction did not differ materially from that of Mr. Pointer, but he testified that Springfield reloaded his gun before advancing upon and firing into Allchin's body after the latter had fallen off the horse; and that, when he walked off from the body after the shooting was over, he, Springfield, exclaimed: "There he is, the damned murdering son-of a-bitch! I will show him how to murder men on the streets!" Wheeler's saloon was about one hundred yards from the front of Zeisner's saloon.

Thomas Whitman testified, for the State, that he lived in Brenham, Washington county. On the Monday or Tuesday before the killing of Allchin, the witness met defendant, then a total stranger to him, at the railroad depot, and asked him if the trouble in Hempstead was settled yet. Defendant replied: "No, it is not settled, and Allchin will bite the dust within two

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weeks. Uncle Tom is willing to drop it and let the law take its course about the killing of Chambers, but Allchin is still toting his Winchester, and keeps seven or eight armed men—all strangers,—at his house. Probably others besides Allchin will be killed."

The material part of the testimony of the State's witness, T. Johnson, was that the Houston & Texas Central Railway freight depot was about two hundred yards distant from Zeisner's saloon and about three hundred yards distant from Wheeler's saloon. The platform at the said depot was elevated four or five feet above the ground. Allchin came to the said depot on the morning of the fatal day, bringing his Winchester with him. Witness asked him: "Steve, can you manipulate that thing well?" He replied: "Yes," and at the request of witness flourished it about his head, handling it with apparent ease. Witness then remarked to Allchin: "I am glad the trouble between you and Captain McDade has been settled." He replied: "Yes, that trouble has been adjusted. I will never bother the McDades if they never bother me." He did not explain to the witness the basis of the settlement, nor tell him of any agreement about the trouble to which he was a party.

C. C. Pye testified, for the State, that about fifteen or twenty minutes before the shooting of Allchin occurred he, witness, went from the post office to Wheeler's saloon to get a drink. He got his drink, and as he passed out of the saloon he saw defendant and Springfield standing on the southeast corner of the sidewalk, in front of Wheeler's said saloon, and heard one of them say to the other: "That's him down there now." Witness did not know who was referred to. He went on back to the post office and soon afterwards heard, but did not see, the fatal shooting. He did not see Christy Williams in Wheeler's saloon.

The material part of the testimony of E. H. Jones, a witness for the State, was to the effect that he was at Felker's store and at Wheeler's saloon a few minutes before the shooting. Defendant and Springfield, neither of them having a gun at that time, invited the crowd present to drink. Witness stepped out of the saloon and soon afterwards Eck McDade and several others came out, but witness saw no more of defendant or Springfield until after the first shot was fired. When the shooting commenced the witness ran to Haveman's corner, and saw Springfield standing on the sidewalk. He said: "That is

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the way we do the damned sons-of-bitches." About this time Deputy Sheriff Tommie McDade came running to the crowd with a six shooter. Springfield remarked: "I am ready to surrender." Phil Duer said: "Boys, this thing has gone far enough." Springfield again said that he was ready to surrender, and added, speaking to defendant: "Come on, Jack." Defendant remarked that there were other damned sons-of-bitches in the store, and the party, including Springfield and defendant, Tom and Eck McDade and Phil Duer, went up the street, and witness saw them no more.

George Burton, recalled by the State, testified that on his way down the street, to the point where he shook hands with Allchin, he met Springfield going hurriedly towards Wheeler's saloon. He then had no gun in his hands.

E. Crews testified, for the State, to the effect that just after the shooting was over, he met defendant, Springfield, T. S. McDade and Eck McDade, going towards the court house. Defendant shouted and said: "We got him that time, Uncle Tom!"

At this stage of the proceedings a saddle and a suit of clothes were introduced in evidence by the State. They were identified as the saddle used and the suit of clothes worn by deceased when killed.

The State closed.

James A. Felker was the first witness for the defense. He testified that he had known the deceased about five years at the time of his death, during which time his relations with deceased were of a very friendly nature. He was not on the bond of the deceased to appear and answer an indictment charging him with the murder of Chambers. The deceased was wounded in the fight with Chambers, and was confined to his room about three weeks as the result of his wound. During the time that the deceased was thus confined, two gentlemen came to witness and requested his co-operation in an attempt to bring the trouble between the deceased and the McDades to an amicable settlement. They assigned to the witness the part of intercessor with the deceased. The witness at first declined to have anything whatever to do with the matter, but finally agreed to act in conjunction with Mr. Pinckney in appealing to Allchin and the McDades for peace. It was then agreed that witness and Pinckney would go to Allchin's house on that night. Witness first called upon Mr. R. R. McDade,

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nephew of Sheriff T. S. McDade, and asked him if the McDade side of the trouble was willing for the attempt to make peace to be made. Mr. R. R. McDade replied that he and Sheriff McDade were not only willing to accept a peaceable settlement, but were anxious for it; and that it was at his, R. R. McDade's instance that Pinckney and the other gentleman appealed to witness to act as a joint mediator in the matter. According to this arrangement, witness and Mr. Pinckney went to Allchin's house that night and proposed to him a peaceable settlement—or, perhaps, it might be more properly termed a truce—pending his, Allchin's, trial for the killing of Chambers. The deceased at first refused absolutely to entertain the proposition, declaring that he had no confidence whatever in the "seed, breed or generation of McDades," but the witness vouched for them as honest, upright citizens, and deceased, protesting that he wanted no trouble with the McDades, finally agreed to make terms on an equitable basis, and asked what was required of him. At this point the witness and Pinckney suspended the negotiation and went back to the McDades to ascertain the terms or conditions they would insist upon. Captain (Sheriff) McDade said that Allchin must be required to quit carrying his Winchester. Witness and Pinckney reported to Allchin that he would be required to quit carrying his gun, and he at once positively and emphatically rejected the terms, saying that he had been in the habit of carrying his Winchester since long before the trouble with the McDades, and that, in view of the circumstances surrounding him, he did not propose to go unarmed. Witness and Pinckney reported accordingly to Captain McDade, who proposed that if Allchin insisted upon bearing arms as a necessary precaution to his protection, he, as sheriff, would license him, Allchin, to carry a pistol. This proposition was made to Allchin, who rejected it, saying that he would not discard the gun he had been long carrying for a pistol, in the use of which he was totally unpracticed. The witness and Pinckney, as mediators, agreed that Allchin could continue to carry his Winchester, but only as he had hitherto carried it,—that is, on his horse or in his buggy, but not on the streets of Hempstead when on foot. In short, the agreement was that Allchin was to carry his gun as he had been in the habit of carrying it; and up to the time of the killing of Chambers, with one exception, he had never, so far as the witness knew, carried his gun in his hands, but always carried it either

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in his buggy or in a scabbard on his horse. The exception mentioned by witness was soon after a difficulty he, Allchin, had with Mr. Dan Woods, and on the occasion referred to he was in his buggy with the gun in his hands.

A few days after this agreement was entered into, the witness saw Allchin walking on the streets of Hempstead, carrying his gun in his hands in violation of the agreement. Fearing that the McDades might meet him, and that his manner of carrying the gun might provoke trouble, the witness went to Allchin, reminded him that he was carrying his gun in a manner prohibited by the agreement, and appealed to him to desist. Witness said to him: "Now place yourself in their position. Suppose you should come to town and find them walking the streets with Winchesters in their hands, would you like it?" Allchin replied: "By Gosh, you are right. I have not thought about that." He then promised that he would not again violate the agreement, but on coming to town in his buggy he would leave his gun in his buggy, and on coming to town on horseback he would leave his gun in one of the stores until he should get ready to leave. On the evening of that day or the morning of the next Mr. R. R. McDade, having heard of Allchin's violation of the agreement with regard to the carrying of the gun, came to see witness about it, and witness told him that he had already complained to Allchin about the violation of the compact, and that Allchin had promised not to violate it again. Subsequently Captain (sheriff) McDade had an interview with the witness about the agreement, and Allchin's violation of the condition that he was not to carry his gun in his hands on the street—the other condition being that the McDades, including Dick Springfield, were not to molest Allchin, and that either party hearing of threats uttered by the other was to report the same to the witness and Pinckney for investigation, before acting upon them. In that interview Captain McDade was told that Mr. Allchin had promised not to carry the gun again in violation of the contract, and he said that the violation then complained of not having resulted in a rupture, it made no difference, but that if the act was repeated the agreement would be considered "off" by the McDade party, and that he, Captain McDade, would no longer be responsible for the future conduct of the McDade boys and Springfield. The carrying of the gun in his hand on the streets, by Allchin on the occasion referred to, the witness considered a positive vio-

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lation of the agreement, and he knew of nothing having occurred to justify or excuse the violation.

On the Tuesday morning before Saturday on which he was killed, Allchin came to see the witness about the trouble between him and the McDades. He was unarmed. He came into witness's office while witness was preparing to go to Austin to attend the interstate drill. Witness said to him: "Good morning, Steve. I am glad to see that you have not got your gun." He replied: "I have promised you that I will not carry it any more, and I do not propose to do it without your permission; but I have come to tell you that they are laying their plans to kill me." The witness said to him: "There is not a word of truth in it." Allchin replied: "Yes they are, and I can name the boys who are going to do it. Jack McDade and Dick Springfield are going to do it, and they are going to do it right out out there" (pointing towards Zeisner's establishment.) Witness replied: "You are a fool, Steve; those people are honorable and if you pursue the course I have advised for you, they won't trouble you." Allchin protested his conviction that the McDades were planning to kill him, and witness asked him if he had had any further trouble with them. He replied that he had not; that, on the contrary, Jack McDade had recently overtaken him on the highway, and that they rode some distance in company, conversing on friendly terms, but that he had received his information "too straight" to doubt that they were planning to kill him. Witness again told him to abide by the contract and he would not be hurt, and then remarked to him: "I am going to Austin to the drill, and will be gone two or three days, and have not time to now investigate this matter, but I will look into it as soon as I get back. Meanwhile you keep out of town. If, when I get back, I find there is any truth in this suspicion of yours I will let you know it. I am placing myself between you and them, and if they should violate their obligations, I would feel very bad about it." Allchin replied: "I would rather have my right arm cut off than to do anything without letting you know." He then started off but came back and said: "I want to let our first contract stand." Witness replied: "You must not carry your gun on the street, and if you do you will do it at your peril." He then asked witness: "If I stay on my horse or in my buggy, will I be violating that contract?" Witness told him that he would not, and he left. Witness went to Austin on that day and did not get

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back to Hempstead until Friday night—the night before the tragedy.

The agreement, contract, truce, or whatever it should be properly termed, did not permit Allchin to get off his horse with his hands and flourish and display it publicly on the railroad depot, and if he did that on any occasion after the agreement was entered into it was a violation of the same, and must have been known to him as a violation. The trouble which resulted in the killing of Chambers by Allchin, and the subsequent killing of Allchin, grew out of an article published in a local newspaper, the authorship of which was attributed to Allchin. The witness never believed that Allchin wrote that article, and when attending on Allchin when he was "laid up" by the wound received in the fight with Chambers, the witness said to him: "Steve, I have never believed you wrote that article. Did you write it or not?" He replied: "Well, I daddied it, all the same." Speaking of the trouble with Chambers, Allchin on that occasion remarked: "There are seven or eight men who ought to have come to my help in that trouble, but only two or three came." At that time there were several men about Allchin's house, including, as witness remembered the names, a Mr. Davidson, a Mr. Williams and a Mr. Floyd. He had also seen a man named Clark about Allchin's house. He knew a man named Swain, but had no recollection of ever seeing him about Allchin's place. Davidson, at the time of Allchin's death, was a stranger in the community. Davidson, armed with a Winchester, was with Allchin on the streets on the occasion when Allchin, in violation of the agreement, was carrying a Winchester. Captain McDade complained about Allchin being accompanied by an armed stranger. Witness informed Allchin of that complaint, and stated to him that, in view of the relations existing between him and the McDades, the McDades were not unreasonable in objecting to his parading the streets in company with an armed man who was unknown in the community. Allchin explained then that the reason he had his Winchester on that occasion was that he had left it in a certain store; that the proprietor of that store had closed it and gone home, and he took the gun out because he did not know but that he would need it before the store keeper came back; and that Davidson was armed in anticipation of trouble with a party who had threatened his life. He promised not to again associate with Davidson on the streets. Witness did not know

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whether or not he kept that promise. If Davidson ever worked for Allchin, the witness did not know it.

On his cross examination, the witness said that he did not understand the agreement to preclude Allchin from carrying his gun across his lap when on horseback, but it did preclude him from having it in his hands on the streets. The parties to that agreement were Allchin on one side and T. S. McDade, Jack McDade, Eck McDade, Tommy McDade and Dick Springfield on the other; T. S. McDade agreeing to be responsible for Dick Springfield. Allchin did not tell witness, on the day witness went to Austin, who the parties were that told him Jack McDade and Dick Springfield, under plans agreed upon, were to kill him, but did tell him that he got it too straight to doubt the fact. Either party to the agreement, hearing of threats by the other, was to report the fact to the witness, and he was to investigate the truth of such reports and stop them. When witness started to Austin, Allchin promised that while witness was gone he would do nothing to arouse the suspicion or apprehension of the McDade party. He said at the same time that he would suffer his right arm to be cut off, or would die, before he would go back on his contract, and that he would never attack the McDades, but would act only on emergency and in self defense. It was under the agreement referred to that Allchin came to witness about the alleged plan of the McDade party to kill him. Witness did not investigate the charge thus made by Allchin, because he had to go to Austin to get his family, and did not have an opportunity to investigate on his return. Allchin persistently declared his confidence in the existence of the plan to kill him, and when witness told him that the McDades and Springfield would not kill a man for fun, and would not molest him, he replied: "I have confidence in you, but not a particle in the seed, breed or generation of McDade." The witness knew by common report that a guard of armed men was kept about Allchin's house after the killing of Chambers, but he did not personally know that fact, and did not know that the guard was put there by the county. It was distinctly understood as a part of the agreement that neither party were to pay any attention to irresponsible rumors of threats uttered by the other, but that any threats reported to them through a source in which they had confidence were to be reported to and investigated by the witness. The "first contract" referred to by Allchin in his conversation with witness on Tuesday morn-

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ing, when witness started to Austin, was his, Allchin's, original proposition, at the beginning of the negotiation, that he be permitted to carry his gun in any way that he pleased, including his hands. To that witness replied: "That will never do." Captain McDade never reported any threats to witness as having been made by Allchin.

Continuing on cross examination, the witness said that when Allchin admitted that he had "daddied" the article in the local newspaper. which created the feud, he talked to witness freely and unreservedly about the killing of Chambers. He told witness he regretted that occurrence extremely; that he would not have killed Chambers could he have avoided it, but that he had to kill him, run, or get killed himself; and that he realized positively that had he not killed Chambers he would have been killed himself. He said that of the seven or eight "sons-of-bitches," who ought to have come to his rescue, only three came, the only one of whom, whose name he mentioned, being Jim Armstrong, the druggist. He described to witness one of the encounters he had with Chambers before the killing, as follows: "I went to your (witness's) store and bought something, and from there I went to Haveman's to buy a bridle. While I was in Haveman's, Chambers walked up to me, handed me the paper and asked me: 'Did you write that?' While I was reading the article it suddenly flashed across my mind that he would shoot me while I was reading it, and I handed the paper back to him and said to him: 'You read it, Dick. I did write it, and I have no apologies to make and nothing to take back.' He said to me: 'You have got the advantage of me now, but I will see you some other time.' I said to him: 'You are armed with a six shooter, and we can settle it right now.' Chambers said: 'I will see you another time when I am in town.' I then backed out of the store with my rifle in my hand, and Chambers came out and told me when he would be in town."

This witness was examined at considerable length but little more of material importance was adduced. He stated that the agreement contemplated that Allchin was to carry his gun as he had theretofore carried it, and that, as he had always before carried it in a scabbard, he, witness, considered his obligation to be to continue to carry it in the scabbard. The carrying of the gun across his lap, after displaying it in the manner stated by the witness Johnson, on the depot platform, on the fatal

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morning, the witness considered a violation of the agreement. Allchin was expert in the use of a Winchester rifle.

Phil Duer was the next witness for the defense. He testified that he heard the reports of the fatal shots, and at once started down the street. He met Springfield first and then defendant, both armed with guns. He met Springfield between the stores of Fried and Keiser, in the Haveman block. He asked Springfield what was the matter, and Springfield replied: "The damned son-of-a-bitch tried to kill me and I shot him." The witness and Pointer were the first parties to reach Allchin's body after the shooting, and at that time they examined Allchin's Winchester, which they found lying partly under the body. The guard was pulled clear back, and the gun would not work until a cartridge was taken out of it. That cartridge showed an indentation which looked like the hammer of the gun had snapped on it. The witness had no personal knowledge of the truce agreement entered into between Allchin on one side and the McDade party on the other, but on one occasion, after Allchin got well enough of the wound inflicted upon him by Chambers, the witness saw him on the streets of Hempstead with his Winchester in his hands. The man Davidson was with him, and he, too, was armed with a Winchester. They got out of a buggy with the Winchesters in their hands, and entered a store or barber shop. Witness did not see them come out. Soon after the killing of Allchin the witness sent his, Allchin's, gun to Mrs. Allchin, and afterwards he and Lipscomb went to Mrs. Allchin's house and got it. Witness and W. T. Duer were brothers, and they were related to the defendant. On the Thursday preceding the fatal Saturday, the witness went with Springfield to Waller station, in search of a man who was "wanted" for crime in Montgomery county.

County Attorney Lipscomb testified, for the defense, that he went with Mr. Duer to Allchin's house and got Allchin's gun, which had been sent to the house with the body about an hour before. The said gun was then taken to witness's office. Two cartridges were then removed from it, one from the barrel and one from the magazine. The cap on one of the said cartridges showed an indentation such as would result from the snapping of the hammer on it. The witness was well acquainted with the defendant and Captain T. S. McDade, and with their respective reputations for peace and quietude. It was good.

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Allchin's reputation was that of a dangerous character and an expert in the use of a Winchester.

On cross examination, the witness said that he reached Allchin's body a few minutes after the killing. One of the persons present—Mr. Duer, according to witness's recollection—picked up Allchin's gun. Witness then examined the said gun and found the slide pulled back and open. Correcting himself, the witness said that he was not positive that the gun had a slide, but the place where there should have been a slide was open and contained a cartridge. A considerable quantity of sand was on the gun. This witness and Duer both testified that the parties present at Mrs. Allchin's told them that the gun was not handled nor examined by anybody after it reached the house.

R. R. McDade testified, for the defense, that he was one of the parties who negotiated the "truce" agreement testified about by Felker. He represented the McDade side. Mr. Hanks asked him one evening if the matter of the quarrel could not be settled by the intervention of friends. Witness replied that he would see Captain McDade, Felker and Pinckney, if he, Hanks, would see Allchin. Witness went to see Captain McDade, who agreed at once to enter into a compromise. The negotiation was then conducted by witness interviewing the McDades and Felker and Pinckney interviewing Allchin. The terms first proposed by Captain McDade were that Allchin was not to parade the streets with his Winchester, but to "lay it down." Allchin refused to quit carrying his Winchester altogether, and it was finally agreed that Allchin was to carry his gun exactly in the manner he had previously carried it. He had customarily carried it in a scabbard attached to his saddle, and the witness understood the agreement to confine him to that manner of carrying it. On the Thursday or Friday of the week preceding the fatal Saturday, the witness's son reported to witness that he had just seen Allchin and Davidson on the streets with Winchester guns in their hands. On the very next morning witness went to Felker and complained about this violation of the compact. Felker replied that he had already taken Allchin to task about it, and that Allchin admitted that he had wrongfully carried the gun, and promised that he would not so carry it again. Three or four days later General Bedell reported to witness that he had just seen Allchin and Davidson, both armed with Winchesters, on the street between Arm-

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strong's drug store and the barber shop. Witness again complained to Felker about Allchin and Davidson, the latter being then a stranger in the community, parading the streets armed with Winchesters. Felker subsequently reported to witness that he had seen Allchin, and that Allchin had promised not to violate the agreement again, and not to be again found on the street with Davidson while the latter was armed with a shot gun. Witness and Felker as mediators, had a final meeting after this with the McDade party. The parties present at that meeting were witness, Felker, Captain T. S. McDade, Jack, Tom and Eck McDade and Dick Springfield. On that occasion Captain McDade complained about the persistent violation of the compact by Allchin, and said that if it was again violated by him he would no longer be responsible for his boys. Witness presumed that Captain McDade's said complaint and statement were reported to Allchin, as he soon afterwards saw Allchin in his buggy in front of Felker's store. After this final meeting Captain McDade asked for a personal interview with Allchin, but witness could not say, and in fact did not suppose, that Felker proposed it to Allchin, as, when he subsequently called Felker's attention to the matter, and asked him why he did not bring the meeting about, Felker said that "Steve is such a hot headed fellow I can not trust him." The witness was a nephew of Captain T. S. McDade and a cousin of the defendant.

Deputy Sheriff Claude Loraine testified, for the defense, that he got back to Hempstead from the Austin drill on the morning of the tragedy. He remained at the depot until about eight o'clock, when he went to the jail where Dick Springfield, then acting office deputy, showed him a letter, which letter was addressed to the sheriff, giving the description of a certain fugitive from justice, and asking for his arrest. The witness at a later hour started from the said jail to the house of Burton, his father-in-law, to get breakfast. En route he passed along in front of the Haveman block, and saw a stranger standing by a post at the corner of Haveman's store. That man in appearance corresponded with the description of the fugitive from justice as given in the letter. About ten minutes later witness went into Ingram's saloon where he again met Dick Springfield. He then told Springfield that he had just seen a man standing at Haveman's corner, who corresponded in appearance with the man described in the letter. Springfield then asked witness to

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go with him and help him arrest that man, but witness declined and went on to Burton's, got breakfast, and slept for a while. When he got up he heard about the shooting. The witness was informed of the "truce" compact between Allchin and the McDades, and understood that compact to require of Allchin to carry his gun just as he always carried it before, and that was in the scabbard. The stranger referred to by witness may or may not have been the man seen by Mr. Pointer on Haveman's corner. The witness was not with Pointer and did not see the man at that time.

James Avery was the next witness for the defense. So far as material, his testimony discloses that a few minutes before the killing he and Cameron, Burton, Nast and Miller stepped into Zeisner's saloon to get a glass of beer. While they were in there Allchin rode up to the pavement on his horse, and sent a negro into the saloon to get a dollar changed for him. About the time the negro handed the dollar to Zeisner the witness and his party stepped out of the saloon and each of them shook hands with Allchin, who was then sitting on his horse facing "sort of southeast of northwest with his left side to the south." He had his Winchester across his lap, with his right hand on the breech, his left hand holding the bridle reins, and his leg thrown around the pommel of the saddle. When the witness had shaken hands with Allchin and stepped off about eight feet somebody exclaimed, "look out," and witness, seeing defendant and Springfield on the sidewalk near Haveman's, sprang into Haveman's store and did not see the firing of the shots. The witness at no time before the shooting saw any change in the position of either Allchin or his horse. The witness met Allchin several times on the streets of Hempstead after he was said to have entered into the agreement with the McDades, and on each of those occasions he was carrying his Winchester in his hands. On his cross examination the witness said that when he first saw the defendant and Springfield, just as Mr. Burton gave the alarm to "look out," one of them had a gun partly raised. Witness was between them and Allchin, and, knowing them to be hostile, he did not tarry in that position to witness the subsequent proceedings, but got into Haveman's store as speedily as possible. Witness did not see Allchin at the instant the alarm was given by Burton. He did not see Allchin raise or attempt to raise his gun at any time.

Frank Lipscomb testified, for the defense, that he heard but

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did not see the shooting, and reached Allchin's body about twenty-five minutes after he was killed. Allchin's gun was then lying by the body, but witness could not say that it had not been taken up and put back before that. The guard and slide were entirely back, exposing one cartridge in the barrel and one in the magazine. It was an old gun and the slide was quite loose. A jar would not throw back the slide of such a gun in good repair. On his cross examination, the witness said that he did not pick up the gun, nor did any other person while witness was present. It was on the ground when witness saw it, and it was then at full cock. The lever was not off the cartridge.

H. J. Harvey was the next witness for the defense. His attention was called to a certain note which he identified as a note he wrote to Dick Springfield, and sent to Springfield a day or two before the killing. The note is not set out in the statement of facts, nor does the testimony clearly disclose the substance of its contents, but it is clearly to be inferred from the statements of the witness that it was a warning to Sprinfield to expect trouble with Allchin, or danger from Allchin and his friends, on the following Saturday—the Saturday of the killing. The witness admitted that the information conveyed to Springfield was not obtained by him from any direct source, and his testimony clearly indicates that he informed Springfield that a man named Davidson was then in that part of the county of Waller in which the witness lived, acting ostensibly at the instance of Allchin, and summoning Allchin's friends to assemble in Hempstead on Saturday, under arms, and for a hostile purpose in connection with the Allchin-McDade feud.

Mr. Willis, the next witness, was subjected to an exceedingly close and searching examination by the defense, and an equally rigorous cross examination by the State. The material substance of his testimony was that he lived in Waller county, Texas, about thirteen miles south of Hempstead, and three or four hundred yards distant from the house of the preceding witness Willis. The witness served on the jury at the trial of the "Anderson case," at the March term, 1888, of the Waller county district court. As he left the court house after the verdict in that case was rendered, being then in company with Jake Quillen, a neighbor, the witness met Allchin, who remarked to him: "Well, you turned Anderson loose." Witness replied in the affirmative. He then said something which

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amounted to an invitation to witness to join a club, adding: "Jake will tell you about it." Witness at once asked Quillen about the club, and Quillen advised him to go to the drug store and see Armstrong about it. After this, and before the killing of Chambers, which killing occurred in April, 1888, witness and Allchin rode out of Hempstead together. Allchin had previously told the witness that the McDades had assassinated one person, and that he expected them, in connection with Dick Chambers as the active agent, to attack him. As they approached the jail on this occasion, Allchin said to witness: "Will, you had better either ride on ahead of me or come on behind." Witness's next conversation with Allchin was after the killing of Chambers and but a few days before he was killed himself. On that occasion he met Allchin, who had his Winchester in his hands, near Haveman's store, and during that meeting Allchin told witness that he killed Chambers, and that he was justifiable in doing so; that Springfield intended to kill him, Allchin, but that he intended to get the drop on Springfield; that he, Allchin, had been going about the streets of Hempstead, using his Winchester as a walking stick, but that Springfield had not taken it up, and that the coming Saturday—which proved to be the fatal Saturday—would be the last day that Springfield would walk the streets of Hempstead. In the course of a previous conversation about Captain McDade's canvass for re-election as sheriff of Waller county, Allchin said to witness: "He (Captain McDade) can not be beaten. He will get a majority every time, and the only way to beat him is to get him out of the way." He did not say that he, Allchin, was going to put McDade out of the way, nor did he suggest any mode in which it could or should be done.

On the Tuesday or Wednesday preceding the fatal Saturday Allchin charged the witness to tell Jake Quillen that "the thing was coming off on Saturday," and that he, Allchin, hoped Quillen would be in town on that day. Witness did not deliver that message to Quillen, but late on Friday evening Quillen went with witness to witness's house, where they found a Mr. Polk who had come to return a borrowed plow. The witness invited Quillen and Polk to take supper with him, but they declined, and retired to a point behind the house, where they conversed privately for an hour. Witness overheard that conversation in part. He could not repeat what he heard, word for word, but the substance of it was that Allchin wanted Quil-

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len to go to Hempstead on the next day, and that the message to that effect was brought by Davidson. Mr. Quillen was a special friend of Allchin.

On cross examination the witness declared that, while he and Captain McDade, during the latter's life time, were particular friends, he and this defendant were not especial friends. In the conversation at Haveman's, detailed on direct examination, Allchin told witness that he wanted him, witness, and all of his friends to come to Hempstead on Saturday, and that he wanted them to come armed; that he was going to station his friends at different points on the streets of Hempstead, and that, if the McDade party interfered with them, he and his party would "get away" with them. Witness replied to Allchin's invitation to join him that he had a family to provide for, and that upon principle he could take no part in such an enterprise. Allchin then asked witness to say nothing about what he had told him, but to tell Quillen not to fail to come to Hempstead on Saturday. Witness did not report his conversation with Allchin to Springfield or either of the McDades. Allchin was a "straight man" whom the witness liked, and he readily agreed to and did comply with Allchin's request to repeat nothing he had said, but he did not deliver Allchin's message to Quillen. Witness went to Hempstead on the fatal Saturday, but not in consequence of Allchin's request. He reached Hempstead about thirty minutes after Allchin was killed. He went first to Zeisner's saloon, and then to the jail, where he saw the defendant and Springfield. He went to the jail to satisfy a curiosity common to him and the majority of other people—to see the men who did the killing. He did not then tell Springfield nor any of the McDades what Allchin said to him on the previous Tuesday or Wednesday. He did not tell that until some time after the killing, and among the first persons whom he told was Mr. Jim Bethany, who was his, witness's, uncle and the defendant's father-in-law. Jake Quillen went to the jail with witness on the fatal Saturday, after the killing. The forty or fifty other people then in the jail the witness understood to be a crowd collected by the sheriff to protect defendant and Springfield. Witness was not a part of that guard. Witness and old man Harvey and Charley Quillen went to Hempstead on Monday after the killing to get a coffin in which to bury one Frank Shelby, who died on Sunday night. Near Three Mile creek they met old man Wommack at

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the head of a mob of forty or fifty men who had organized on said Three Mile creek on the preceding night. The mob was moving away from Hempstead. Old man Wommack said that they intended at first to go to Hempstead and "take out" the defendant and Springfield. He then said to Harvey and witness: "You tell old man Tom McDade that I am sorry I undertook this thing; that we were going there to see the laws put in force; but we have found out that we are wrong and are on our way back." Witness did not go the jail on that day, and did not see either defendant, Springfield or Captain Tom McDade.

Pillott Wood was the next witness for the defense. The material substance of his testimony was that, subsequent to the killing of Chambers by Allchin, he frequently saw parties about Allchin's house who appeared to stay there. Of that number the witness only knew Jimmy Clark. He did not know Davidson, Floyd, Swain nor Charley Wall, nor could he say that they were among the parties who stayed about Allchin's house. About two weeks previous to the fatal Saturday, which was subsequent to the killing of Chambers, the witness, in passing Allchin's house, saw a crowd of men shooting at a mark with Winchesters. He recognized only Allchin and Clark, The witness saw Allchin in Hempstead, armed with a Winchester, about two days before he was killed. He was on horseback.

On his cross examination the witness said that he had known Allchin for several years. Allchin's reputation was that of an ordinarily quiet, peaceable law abiding citizen, but dangerous when aroused to anger, and easily aroused. The witness was one of the sureties on the appearance bond of Allchin for the killing of Chambers. The killing of Chambers and the subsequent killing of Allchin did not grow out of a political feud, but out of enmities engendered by the publication in a local newspaper of an article attributed to Allchin, reflecting severely upon the grand jury and certain of the county officials. The witness was a member of the impugned grand jury. After the killing of Allchin the feud over the published article was taken into politics to secure the defeat of Captain McDade in his canvass for re-election as sheriff. The witness had never heard the character of Allchin impeached as a quarrelsome bully. He saw Allchin near the freight depot on the day before he was killed. He was on horseback and had his Winchester across his lap. The witness knew, by current report, of the

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compact then existing between Allchin on one side and the four McDades and Springfield on the other. As to the manner in which Allchin carried his gun being a violation of the compact, the witness had no opinion to express other than that he thought if he had been in Allchin's place he would not have carried the gun at all under the circumstances. The witness could not be induced to believe from what he knew of Allchin, that he would "put up a job" to assassinate a man. He was an honest, hard working, economical man. Captain McDade, until he retired from the contest for sheriff, was running as the candidate of the Republican party.

N. A. Cuney testified that he was the present owner of the gun owned by the defendant at the time of the killing of Allchin. It was a hammerless gun, and would not make a noise in preparation for discharge that could be heard at a greater distance than four or five feet. It did not make a noise in any way similar to the noise made by the cocking of an ordinary gun.

P. H. Floyd testified, for the defense, that he was the Floyd who stayed at times at Allchin's house, and who was referred to by other witnesses in this case, and his home was in Washington county. Allchin was a "sort of" cousin to the witness. He sent Davidson and Jim Clark to hunt for witness on Friday of the week preceding his death. His reason for sending for witness was, as stated by him, that he had heard a rumor to the effect that the witness was drowned. Witness remained at Allchin's until Tuesday before the fatal Saturday. While at Allchin's house Allchin told witness that he was going to send into the country for Jake Quillen and others of his friends to assemble in Hempstead under arms on the following Saturday; that Davidson was to go after Quillen and his said friends, and on Saturday was to post those men at different points on the streets of Hempstead; that he expected to have a little difficulty in Hempstead on that day; that Davidson was to ride through the streets of Hempstead armed with a Winchester and start the fuss by making remarks; that he wanted witness to come to Hempstead on that Saturday, and to come armed with a Winchester rifle if he could borrow one. The witness agreed to be in Hempstead on the said Saturday, but made no promise about helping Allchin in the fuss he was to provoke through Davidson. On the following Friday evening—the evening before the killing—the witness borrowed a Winchester rifle from

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Statement of the case.

Phil Huffman. Huffman asked him what he wanted with the rifle. He replied that he wanted to kill rabbits with it, which was the truth. Witness did not go to Hempstead on the fatal Saturday, as he promised. While on the said visit to Allchin's house, the witness, Allchin and several others, including Davidson, Clark and a man named Swain, four or five of the party being armed with guns, went to the Brazos river in a wagon. They had no other object in going to the river than to see the extent of the rise in it. Witness heard nothing said by anybody about defendant on that trip.

Cross examined, the witness said that when Allchin asked him to come to Hempstead on Saturday, he said that he was going to have a little difficulty. He did not say what he was going to do, but did say that either Jack McDade or Dick Springfield would "bite the dust." Further interrogated the witness stated that on that occasion Allchin told him that he was going to settle the difficulty without a fuss if he could, but that he expected to have a difficulty, and if he did Jack McDade or Springfield would "bite the dust," and he wanted witness in town to help protect him. He did not designate the various points where Davidson was to station his men, nor did he, that witness remembered, state what particular remarks Davidson was to make on the streets, as a means of starting the fuss. If the witness testified on the habeas corpus trial that Allchin told him that Davidson was to ride through the streets of Hempstead armed with a Winchester, hallooing: "Hurrah for Allchin! and that if Jack McDade or Springfield interferred they would bite the dust," then that testimony was true. It was on Tuesday that this conversation between witness and Allchin occurred. It occurred in the yard at Allchin's house. It was on the same day that the party went to the river. Allchin was in Felker's store talking to Felker on that morning before he went to the river. Witness crossed the river and went home, and did not go back to Allchin's house on that day. In the same conversation above referred to, Allchin told the witness that his life had been threatened by certain parties. The witness did not think that, on a previous examination of this case, he testified that he failed to go to Hempstead on the fatal Saturday because the river was too high to be crossed. As a matter of fact he was prevented from going by a combination of business and high water—the business being the insuperable obstacle. He promised Allchin to be in Hemp-

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stead, but did not promise him to take part in the fuss. The witness borrowed the Winchester for the purpose of killing rabbits and not for the purpose of participating with it in the fuss between Allchin and the McDades. Since the preliminary trial of this defendant the witness had married the sister of a man who was now under indictment for the murder of Captain T. S. McDade.

The defense closed.

Mike Floeck was the first witness introduced by the State in rebuttal. He had handled Winchester rifles ever since they had been in the market. Winchester rifles were usually carried with the hammer on the half cock. If the hammer was down on the cartridge there was constant danger of explosion by contact with other objects.

J. A. Loggins testified for the State, that he was near Springfield and the witness Duer when they met in front of Fried's store just after the killing of Allchin. Springfield did not say to Duer, at that time: "He tried to kill me and I shot him." Springfield said nothing to Duer at that time. He could not have spoken to Duer without witness hearing him. On cross examination this witness said that Springfield and defendant went north together just after the shooting, Springfield perhaps a little in advance. They passed Pointer, witness, Duer and others in front of Fried's store. Springfield made no remark to any body in passing that point, that the witness heard. When Springfield and defendant passed Fried's store Duer was on his way to the body.

George Arnold testified, for the State, that he had known Allchin at the time of his death about eight years, and during that time knew him to be a quiet, peaceable, law-abiding citizen.

Jim Hood testified, for the State, that he was in Hempstead on the fatal Saturday, and met the body of Allchin when it was being removed to his home. He went back to Allchin's house and saw and examined Allchin's gun after it was taken out of the conveyance. It and the body were taken home at the same time and in the same conveyance. That gun was examined and manipulated by Jim Clark before it was called for and taken away by Phil Duer and Mr. Lipscomb. Clark worked the lever and threw out a cartridge or two, which he put back. Besides the witness, Jake and Charley Quillen were present when Clark manipulated the said gun at Allchin's house. The

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gun was examined at the time because a little boy who was present said the gun was fired twice during the fatal transaction. Clark, after examining the gun, declared that it not been recently discharged.

Jake Quillen was the State's next rebutting witness. He testified, respecting the examination of the gun at Allchin's house, after Allchin's body was brought home, substantially as did the witness Hood. He stated further that he went to Allchin's house on the fatal Saturday to complete a horse trade with Allchin. He was unarmed. He knew nothing of the killing of Allchin until he got to the house. Witness was an intense friend of Allchin, and was one of the crowd or mob that organized on Three Mile creek on the Monday morning succeeding the tragedy. Charles Graham testified substantially as did Hood and Quillen about the examination of Allchin's gun, at the house, before it was taken away by Duer and Lipscomb.

Dr. L. W. Groce testified, for the State, in rebuttal, that he saw Allchin's gun and body before either was removed from where they fell. The gun was *not* cocked but was half-cocked, and the slide was open and nearly filled with sand. Witness thought that Allchin was in the habit of carrying his said gun half cocked, and Allchin told him that he always carried it with the slide open.

John Pinckney testified, for the State, that he was one of the mediators, or parties who negotiated the "truce" or compact between Allchin and the McDades. One of the conditions of that agreement was that all threats uttered by either party that came to the ears of the other were to be reported by the threatened party to the mediators for investigation. No notice of threats was ever given to the witness by the McDade party. Witness got to Hempstead from Houston at eleven o'clock on the morning of the fatal Saturday. He was of counsel for the State in this case, and worked up the prosecuting evidence for the examining trial.

The foregoing statement of the case is very greatly condensed from nearly two hundred pages of testimony set out in the record, but is believed to comprise all the material evidence.

The charge of the court referred to in the second head note reads as follows: "The defendant is presumed to be innocent until his guilt is established by the evidence to the satisfaction of the jury beyond a reasonable doubt, and unless the evidence so

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satisfies you, in this case, of the guilt of the defendant of murder of the first degree or murder of the second degree, you will find him not guilty. Or if you believe from the evidence that the defendant was first assailed by the said Allchin in a manner, considering the relative condition and circumstances of the parties, to cause the defendant reasonable apprehension of immediate danger of serious bodily harm to himself,—nor would he be bound to retreat in such case,—and that he acted upon this apprehension in defense of himself against the deceased, he would not be guilty of any offense, unless it reasonably appears from the evidence that the difficulty was begun by defendant, or by Dick Springfield acting together and in concert with defendant, with the intent and purpose of killing said Allchin; in which case the defendant would not be excused or justified, but would be responsible for his acts as you have already been instructed."

Hutcheson, Carrington & Sears and *Gustave Cook*, for the appellant.

The evidence in this case clearly raised the issue of manslaughter, and the court should have given a charge upon that issue. The rule is invariable and without exception that the law, and all the law, applicable to every phase of the testimony must be given by the court in charge to the jury. (Reynolds v. The State, 8 Texas Ct. App., 415; Neyland v. The State, 13 Id., 266; Old v. The State, Id., 612; Rutherford v. The State, 15 Id., 236; Williams v. The State, Id., 617; Washington v. The State, 19 Id., 266; Johnson v. The State, 22 Id., 225.)

The evidence taken throughout, threats, appearances, acts, etc., required a charge on manslaughter, for the whole testimony, up to and at the time of the killing, raised that issue. (Johnson v. The State, 22 Texas Ct. App., 226; Wheelis v. The State, 23 Id., 238; Barron v. The State, Id., 476.)

The court, having refused to give a charge on manslaughter, should have granted defendant a new trial, for the verdict and affidavits of the jurors—the sole judges of the facts—showed that had that issue been submitted to them they might have determined on that degree of homicide, and not found defendant guilty of murder. The jury, in view of their standing, should have been allowed to pass on the evidence under the law of manslaughter. The facts raised that issue, and the defend-

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ant had a right to have them pass on that question, and not the judge.

The court erred in not charging the presumption of innocence and of reasonable doubt in the language of article 727 of the Code of Criminal Procedure, and article 11 of the Penal Code, especially in leaving out the language "legal evidence." (Ferry v. The State. 8 Texas Ct. App., 471; McPhail v. The State, 9 Id., 173; Cohea v. The State, Id., 313; Bramlette v. The State, 21 Id., 611.)

W. L. Davidson, Assistant Attorney General, and *Pinckney & Poole*, for the State.

White, Presiding Judge. This appeal is from a judgment of conviction for murder of the second degree, with the punishment assessed at imprisonment in the penitentiary for a term of eight years.

It is an undisputed, uncontroverted fact that this appellant and one Dick Springfield shot and killed the deceased, S. W. Allchin, with shot guns and pistols, as alleged in the indictment. This appellant does not deny but admits the fact, claiming that he was justifiable in so doing, or at most that his offense in so doing, under the facts developed on this trial, did not amount to murder, but was manslaughter. No issue of manslaughter was submitted in the charge of the learned judge on the trial below, and the omission of the charge in this regard is urgently insisted upon as serious, radical error.

A brief resume of the facts is necessary in order to properly determine the merits of this objection to the charge. About a month before the day of this homicide, the deceased, Allchin, had killed one Chambers, a relative of this appellant and a deputy sheriff of Waller county. Appellant and Springfield were also deputy sheriffs. Out of the killing of Chambers by Allchin a bitter feud and hostility arose between the McDade or sheriff's party and Allchin, which became of so serious a character that mutual friends of the two parties interfered to settle it, and finally succeeded in patching up or arranging an agreement or truce between them. By this agreement or truce it was, amongst other things, stipulated on behalf of Allchin that he was not to go to Hempstead with his Winchester rifle in his hand, but was to carry it in his buggy, or holster or scabbard on his saddle when he was upon horseback, and that to carry it in

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any other way was to be considered by the other party as a declaration of hostility. None of the McDades were to molest him in any way, and if either party heard of threats made by one against the other, or of acts against the agreement, they were to report it to mutual friends. A week or so before the killing Allchin, on one or two occasions, was seen by the McDades carrying his Winchester in his hands on the streets of Hempstead, and the McDades complained of it as exciting their serious apprehension of danger. Allchin was told in the final conversation, by mutual friends, that again to carry his gun in his hands would excite apprehension in the McDades' minds and would be to them a declaration of hostility, and he assented to the justice of this statement. Several ruptures of the agreement were shown on the part of Allchin, and these breaches of the contract were known to defendant. A few days before the killing defendant received a written notice from Harvey that Allchin would be in town on Saturday, with his friends, to kill defendant; threats of death were communicated to defendant. The evidence shows threats upon the part of Allchin against defendant, some communicated and others not. On Saturday Allchin came to town on horseback, and was seen at several points in and upon the streets and at the depot. He had his Winchester rifle with him, and was handling it upon the depot platform. There was a public park or square in the center of the town, surrounded on the north and west by business houses. Haveman's corner or business house was the corner house on the south of the west block which fronted this square. On the northwest corner of this square was Wheeler's saloon. Some time before the killing Allchin was on horseback at or near Haveman's corner talking to some friends on the side walk. His horse's head was north, or up the street, in the direction of Wheeler's saloon. He had his back to Haveman's corner, and his leg was thrown over the horn of his saddle, and his Winchester was lying across his lap, half cocked, which was the usual way he carried it for safety from accidental explosion. He could be seen from Wheeler's saloon. A short time—a few moments—before the shooting, Springfield and appellant were near Wheeler's saloon, and one of them was heard to say to the other: "That's him," or "is not that him down yonder now?" They went into the saloon, took a drink, and were next seen to emerge from the rear end of said saloon, in an alley between it and the adjoining building, with

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double barreled shot guns in their hands. They proceeded diagonally across the street into the alley in rear of the building on the west side of the square; went down this alley rapidly a distance of six or seven hundred feet from Wheeler's to the street west of Haveman's, and then up said street to the front or southeast corner of Haveman's, which brought them to the sidewalk within a few feet of where Allchin was sitting on his horse, as above described, with his back to them. Just as they got upon the sidewalk, some one exclaimed: "Look out!" and the shooting commenced, and was kept up by Springfield and defendant until deceased fell from his horse, when they went up to the struggling and almost inanimate body and finished the work by other shots from gun and pistol into his head and face, saying, when they had finished by shooting his face off entirely: "That's the way we do men who murder men on the streets." Allchin did not fire a single shot, nor does it appear that he had time to do so, or even time to make an effort to do so. It does not appear that he even saw the parties, or could have seen them from the time they left Wheeler's saloon until they fired upon him.

Evidence was adduced by appellant tending to show that he and Springfield went from Wheeler's saloon to Haveman's corner in the manner they did and armed as they were, for the purpose of arresting a fugitive deperado and murderer from Montgomery county, for whom they had a warrant of arrest, and who was reported to them as having been seen at or near Haveman's corner just before they armed themselves and started by the alley way from Wheeler's, and that their seeing Allchin when they reached the front of the Haveman corner upon the sidewalk was sudden and wholly unexpected.

Upon the above recited state of facts, it is strenously insisted that on account of the previous threats and acts of Allchin, the fact that he was thus suddenly seen carrying his gun in violation of his agreement, and which in itself was by said agreement a declaration of hostility, the appearances of danger to appellant and Springfield were such as were calculated to arouse a degree of anger, rage, sudden resentment or terror in persons of ordinary temper, sufficient to render their minds incapable of cool reflection, and that, having acted upon such appearances and from such impulses and passion, the issue of manslaughter was clearly raised, and should have been given in charge to the jury as a necessary part of the law of the case.

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Suppose, in the light of the most potent if not overwhelming facts to the contrary, we concede for the argument's sake that, as appellant contends, the coming upon Allchin by appellant and Springfield was sudden and unexpected, and without premeditation or intention, could his mere presence, and his presence with his back to them at that, unaccompanied by a single hostile word or deed, save the single fact that he had his gun across his lap, have aroused in the mind of a person of ordinary temper any of the emotions of the mind calculated to render it incapable of cool reflection? But it is said his having his gun in his lap, and not in his scabbard, was according to his own solemn agreement and contract, an overt act of hostility, as much so as if it were directly drawn and presented upon them. If such had been the spirit and intent of the agreement as between the parties, the law could not afford to tolerate, much less recognize a doctrine so variant from and at war with every principle it maintains for the welfare of society and the protection of human life, and sanction or mitigate the taking of human life under such pretext. Because it was so "nominated in the bond" could neither justify nor mitigate or excuse it, if in contravention of the law. The law can not and will not permit men to kill each other with impunity, notwithstanding they may have bound themselves to that effect with each other by the most solemn obligations.

It was held at one time in Kentucky "that if a man feels sure that his life is in continual danger, and that to take the life of his menacing enemy is his only security, he may kill that enemy whenever and wherever he gives him a chance, and there is no sign of relenting." (Carico v. Com., and Phillips v. Com., Horrigan & Thompson's Self Defenses, pp. 383–389.) But this doctrine has been overruled even in that State (Bohannon v. Com., Id., 395), and has never, so far as we are aware, been recognized as the law elsewhere. Such a doctrine would make the bare presence of an enemy an overt act justifying his destruction.

But, it is said, Allchin was not only guilty of a "declaration of hostility" by the manner in which he was carrying his gun, but, in addition thereto, he had made threats that he would kill the McDades or any of them he might get an opportunity to kill, on that very day. In Johnson v. The State, 27 Texas, 758, Judge Moore says: "In no case under the provisions of the Code, or out of it, if we were permitted to look elsewhere to

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ascertain the law upon the subject, can it be held that mere threats, unaccompanied by some demonstration from which the accused may reasonably infer the intention of their execution by the deceased, either justify such homicide or reduce it from murder to manslaughter. * * * The doctrine contended for must, therefore, be narrowed down to this simple proposition: that the mere fact of being encountered or overtaken in the street or public highway by one who has threatened another's life some months before, without any act whatever indicative of an intention of then carrying such threats into execution, is 'adequate cause' to excite such 'anger, rage, sudden resentment or terror' as renders the mind 'incapable of cool reflection.' The bare statement of this proposition is sufficient for its refutation. If such was the case, the language of passion, forgotten with the occasion which gave it utterance, the idle talk of the silly or the inebriate, must be paid for with the penalty of life. A full floodgate would be given to the most wicked passions, and murder, fearful as it already is, in a ten fold greater degree would stalk through the land, clothed in the panoply of law." (Penal Code, art. 594; Willson's Crim. Stats., sec. 1009.)

Under our statute with regard to threats as evidence (Penal Code, art. 608), "it is not practicable to fix on what the act manifesting the intention of the deceased to execute his threats shall be, but it must be some act reasonably calculated to induce the belief that the threatened attack has *then* commenced to be *then* executed, and not a mere act of preparation to execute the threats at some other period of time, either speedy or remote." (Irwin v. The State, 43 Texas, 236; Lynch v. The State, 24 Texas Ct. App., 350; Brooks v. The State, Id., 274; Willson's Crim. Stats., sec. 1053.)

We are of opinion, for the reasons above given, that the court did not err in declining to submit in the charge to the jury the issue of manslaughter as an issue in this case. And for the reasons above given, we are further of opinion that the court did not err in refusing to give the following special requested instruction asked in behalf of defendant, viz: "If you believe from the evidence that the defendant and the deceased, either in person or by parties representing them, made an agreement, the object of which was to prevent further hostilities and to preserve the peace, and that they agreed on certain conditions which were to be observed by both parties, the

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violation of which was to nullify the agreement and give notice that it was terminated, and if you further believe that after such agreement was made, if any ever was, that the dedeceased, Allchin, in violation of his agreement, if any, did any act or acts in violation thereof, and that the defendant knew, or heard, of the same, and honestly believed that the same was a declaration of hostility, and that he was in danger of death or serious bodily harm; and if you further believe that, after the agreement, if any, was broken by the deceased, the defendant saw deceased in the act of violating his agreement, and that so seeing him, defendant believed himself in immediate danger of death or serious bodily harm, then defendant had a right to act on the appearances of danger to himself, if any, and though defendant may have been mistaken in his belief of immediate danger of death or bodily harm, yet if he honestly believed, and had reason to believe, that he was in such danger, and honestly acting on such appearances he killed Allchin, he would be guilty of no offense, and you will find him not guilty."

"If the jury believe from the evidence that there was a contract between the deceased and the defendants, by the terms of which he was not to carry his Winchester in his hands, or otherwise than attached to his saddle in a scabbard, or in his buggy, and if they further believe that the said contract was made, and that deceased failed to conform to the same, and that complaint was made to the parties negotiating between the deceased and the defendants concerning such contract and breach thereof, and that said parties notified the deceased that again to carry his weapon in a manner not provided in said contract would be regarded as a breach thereof and a hostile demonstration, but that such was the understanding between the parties; and if the jury believe that at the time of the killing the deceased with such knowledge on his part, and the defendants with such understanding on their part, found the deceased carrying his weapon in an attitude which was in violation of the contract, what the parties regarded as a hostile demonstration, and came suddenly upon him, and thereupon shot and killed the deceased, then the defendants are not, in law, guilty, and you will acquit by your verdict."

The charge of the court on self defense was, in our opinion, sufficient and pertinent to the facts in evidence, if, indeed, the issue of self defense could in any manner be said to have been

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legitimately raised by the facts. (Willson's Crim. Stats., secs. 969, 970, 978.) The evidence totally fails to show any real or apparent danger at the time appellant and Springfield opened fire on Allchin. He was sitting on his horse, with his back to them, his gun across his lap, talking to some party or parties on the sidewalk; he did not and could not have seen them, and if he grasped his gun at all it was after the appearance of appellant and Springfied upon the sidewalk, with their guns, had occasioned some one to exclaim "look out;" and then, before he could have raised his gun from his lap he was fired upon by these parties. and his gun was never in a condition to be used upon them after they commenced the attack.

Upon "reasonable doubt" the court instructed the jury that "the defendant is presumed to be innocent until his guilt is established by the evidence to the satisfaction of the jury beyond a reasonable doubt." This was specially excepted to because of the omission of the word "legal," as used in the statute before the word "evidence." (Code Crim. Proc., art. 727.) Whilst it has been uniformly held and recommended by the court that reasonable doubt should be charged in the exact language of the statute (Bramlette v. The State, 21 Texas Ct. App , 611), we have never held that a substantial compliance with the terms of the statute was not sufficient. (Willson's Crim. Stats., 2426, 2427, 1071.) It is not perceived how the omission of the word "legal" before the word "evidence" could in any manner have misled the jury, or have proved prejudicial in any manner to the rights of the accused.

In the seventh assignment of error it is complained that "the court failed to instruct the jury that the declaration of Allchin to Felker that threats had been made against him by defendant was not any evidence that such threats *were made*, and that they should not consider such statement as a part of the evidence for that purpose, when it was expressly requested so to charge by defendant." This evidence was drawn out by defendant upon the direct examination of his witness Felker, and neither the prosecution nor the court was responsible for it. If the defendant elicits testimony adverse to himself he must abide the consequences. (Speight v. The State, 1 Texas Ct. App., 551; Moore v. The State, 6 Id., 562.)

One of the grounds of motion for new trial was that the verdict of the jury was arrived at by unfair and illegal means, and was in fact decided by lot or means equivalent thereto. A juror

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made affidavit to this effect. But in addition to the fact that no complaint or objection was heard from him when the jury was polled after the verdict was returned into court, he is flatly and positively contradicted upon the point relied upon, by the affidavits of ten of his fellow-jurors filed by the State in answer to this ground of the motion. It was not error to overrule the motion based upon this objection to the verdict.

We have examined and discussed all the grounds mainly relied upon by able counsel for appellant, and besides have read re-read and maturely considered this voluminous record with a view of seeing whether in the conduct of the trial any proceedings were allowed likely to impair the fairness and impartiality of the trial, and impeach the legality of the conviction; and we are constrained to say we have found none. The trial has been fair and impartial so far as we have been able to judge of it from the record, and, considered in the light of the record, we think appellant has every reason to congratulate himself upon the mildness of the punishment awarded him. The judgment is affirmed.

Affirmed.

Opinion delivered May 18, 1889.

No. 6452.

W. S. NUCKOLLS *v.* THE STATE.

THEFT—EVIDENCE.—See the opinion and statement of the case for evidence *held* to have been erroneously admitted, because it was hearsay testimony calculated to prejudice the defendant.

APPEAL from the County Court of Clay. Tried below before the Hon. B. F. Turner, County Judge.

This conviction was for the theft of a plow, a double tree, a single tree and clevis, of the aggregate value of six and a half dollars. The penalty assessed was a fine of two hundred dollars and confinement in the county jail for twenty days.

D. Gilvin was the first witness for the State. He testified that in April, 1888, he lived on Mrs. Mason's place, in Clay

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county, Texas. A severe rain fall interfered with plowing on Friday, April 20, 1888, and witness's boy, who had been plowing on the place, left the plow and the plow gears—which gears belonged to one Thompson—in the field about twenty feet from the road. Witness and Thompson passed over that road late on Saturday evening, and noticed the plow and gears. Witness remarked: "There is a good chance for somebody to get some gears." Thompson replied that the gears being old and worn, the plow was more likely to be stolen. The plow was next seen by witness on the defendant's place in Buffalo Springs on or about May 20, 1888. When witness and Bill Evans first went to defendant's place the defendant was not at home, and Evans refused to help search defendant's place without a search warrant. Accordingly the witness went to 'Squire Goad and got a search warrant. He then got Constable Jack Evans and Mr. Wear and went to the defendant's west place, which was about five miles distant from his Buffalo Springs place. Thence they went to where defendant was building a tank, about half a mile from the said west place, and there the witness found his clevis, which he fully identified. Thence the witness, Jack Evans and Wear went to defendant's place in Buffalo Springs. Arriving late, they made but a short search, and went to Bill Evans's place and passed the night. Early on the next morning they went back to defendant's house, and were met at the door by the defendant. Jack Evans told defendant that he was hunting for a cast plow that had been stolen from witness, and that he was acting under a search warrant. Defendant replied that there was no such plow on his place, and that no such plow had been on his place since Mr. Burnett's was removed thence during the preceding January. Witness remarked: "That is not the plow I want. I want the one for which you bought the new points that were brought from town to you by Mr. Long." Defendant made no reply, and the witness and his party went to a wagon on the place, where he found his double tree, the same being the double tree of an Osborn mowing machine. Defendant claimed that he brought that double tree from Tarrant county. Jack Evans then arrested defendant, telling him that whatever statement he saw proper to make could be used in evidence against him. Evans then turned defendant over to Wear with instructions to take him to 'Squire Goad, and witness and Evans then went back to the Buffalo Springs place to hunt for the plow. En route they met

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Bill Evans, who told them that J. R. Whitley told him, Bill Evans, that the plow was in a rail pile on defendant's place in Buffalo Springs, and that if he, Bill Evans, and witness had looked there for it on the night before, they would have found it. Witness and Jack Evans went to the said rail pile, and there found the said plow, which witness fully identified. They took the plow to 'Squire Goad's office. Goad then asked defendant what should be done with the plow? He replied: "He will swear to it; let him take it." On his cross examination the witness said that the plow was not a Deere plow, and he did not tell Bill Evans and A. D. Long that it was a Deere plow. He did not describe it by the name of the manufacturer, for at that time he did not know it himself.

The State witnesses Wear and Jack Evans corroborated Gilvin in detail as to what transpired during the search for the alleged stolen property, as to the finding of the same and the arrest of the defendant. Wear testified, in addition, that, en route to 'Squire Goad's court with the defendant after his arrest, the defendant requested to be taken by the house of one Parish, so that he might there employ some hands to continue work on a tank he was constructing. Witness stopped on high ground and permitted defendant to go to Parish's house, on his promise to return and accompany him to 'Squire Goad's. Defendant not returning within the time allowed him, witness went to Parish's house and learned that defendant had left. He then rode hurriedly toward the defendant's east or Buffalo Springs place. About a mile distant from that place he overtook defendant and asked him why he had attempted to escape him. He replied that he was going to see one Whitley to get him to work on the tank. Witness then took defendant to 'Squire Goad's office. The witnesses Wear and Jack Evans testified that they had known the defendant for five years, during which time his reputation for honesty was excellent. He was in easy financial circumstances, and able to purchase a car load of plows if he wanted them.

The material part of the testimony of the two Messrs. Long, State's witnesses, was that one of them worked for the defendant, on his place, from March 10 to March 28, 1888, during which time he plowed with a South Bend cast plow, furnished by defendant, and the other witness, about April 20, 1888, at the request of defendant, got a point for a cast plow, at Barber's hardware store in Henrietta, and took it to defendant.

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Opinion of the court.

These witnesses also supported the defendant's reputation for honesty.

The State closed.

Bill Evans testified, for the defense, that Gilvin came to witness's house on the day before the arrest of defendant, and he and witness went to defendant's east place to see defendant and search for the plow. Defendant was not at home. Witness then helped Gilvin search the premises for the plow, and did not, as testified by Gilvin, refuse to do so, without a search warrant. Failing to find the plow, Gilvin and witness went to witness's house and spent the night. Gilvin and Jack Evans left early in the morning. During that day, after the arrest of defendant, witness met Gilvin and Jack Evans going towards defendant's east place, and had a conversation with them, but he was satisfied he did not tell them that the missing plow would be found on the rail pile. The said plow was not on the rail pile on the day before, because, if it had been, witness and Gilvin, in passing within ten feet of that pile would certainly have seen it.

A witness for the defense testified that, to his positive knowledge, the defendant, when he moved to Clay county from Tarrant county, brought with him the double and single trees of an Osborn mowing machine, and afterwards used them on his wagon. The witnesses for the defense testified, and counsel for the State admitted, that the reputation of the defendant for honesty was excellent until this charge was brought against him.

L. C. Barrett, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. That portion of the testimony of the State's witnesses D. Gilvin and Jack Evans, which states that Bill Evans told them that one Whitley said the stolen plow was on a rail pile in defendant's lot, was clearly inadmissible, being hearsay, the said statement of Whitley not having been made in the presence and hearing of defendant.

Under the peculiar facts of this case, said illegal testimony was well calculated to injure the defendant in the trial. Whether or not the defendant had any agency in placing said plow on said rail pile in his lot was a most material issue in the case. On the evening before the plow was found on said rail pile, Gilvin and Bill Evans had searched said premises for said

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plow, and had failed to find it. Bill Evans testified that in making said search they had been near to said rail pile, and if the plow had been there he thinks they would have discovered it. He further testified that he did not remember telling said Gilvin and Jack Evans that Whitely had told him the plow was on the said rail pile—did not think he had told them any such thing.

The theory of the defense was that said plow had been placed on the rail pile during the night, pending the search for it, by some person other than the defendant, and without his agency or knowledge, with a view, as the defendant asserted, of "putting up a job on him." It was material error, we think, to admit said testimony, which error, having been properly excepted to, requires a reversal of the judgment.

There are other supposed errors presented by defendant, but, after a consideration of these, we think the only reversible error disclosed by the record is the one above stated, and because of which the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered May 22, 1889.

No. 6509.

JAMES LEEPER *v.* THE STATE.

ATTEMPT TO PASS A FORGED INSTRUMENT—FACT CASE.—See the opinion and the statement of the case for evidence *held* insufficient to support a conviction for attempting to pass a forged instrument, knowing it to be forged.

APPEAL from the District Court of Callahan. Tried below before the Hon. T. H. Conner.

This conviction was for an attempt to pass a forged instrument, knowing it to be forged, and the penalty assessed by the jury was a term of two years in the penitentiary.

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Statement of the case.

The instrument, as set out in the indictment, and as introduced in evidence, reads as follows:

"No. 72

Baird, Texas, 12—28, 1888.

First National Bank of Baird:

Pay to James Leeper or bearer one hundred and fifty-four dollars.

R. B. Dobson.

$154.00"

W. C. Powell was the first witness examined by the State. He testified that he was the cashier of the First National Bank of Baird in January, 1889. On the fourteenth day of that month the defendant came into the said bank, threw on the witness's counter the check in evidence and asked: "What is that good for here?" Dobson at that time had no money, or at least not enough on deposit to pay the said check, and witness called General F. W. James, the president of the bank, who was in his private room, to ascertain if Mr. Dobson could overdraw his account. General James came into the bank and said in the presence and hearing of defendant that Dobson had arranged to borrow a thousand dollars from the bank to use in the purchase of yearlings, but had not made the required security. He added, however, that if the check was given in the payment of yearlings it would be cashed, and asked defendant: "Is that check for yearlings?" Defendant replied that it was not, and that, as Dobson would be in town either on that or the next day, he would see him, arrange the matter and come back. He then left the bank, and never came back, so far as the witness knew. This check was presented to witness in the said bank on Saturday, and Dobson's dead body was brought to town on the following Monday or Tuesday. The signature "R. B. Dobson," appended to this check, in the opinion of the witness was not Dobson's signature, and witness, acting on his own responsibility, would not have paid that check except to a responsible party whose indorsement of the same would make the bank safe. At this point the witness was shown seventy-seven different checks bearing the genuine signature of R. B. Dobson. He declared that the "R. B. D" in each of the seventy-seven checks was the same in formation, and all were different from those letters in the signature to the

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alleged forged forged check. In the genuine signatures the D and o in the name "Dobson" were connected, and in the alleged forged check they were separate. The witness did not particularly observe the signature at the time the check was presented to him by defendant, because he knew at once that the amount named in the check was an "overdraw,"—and Dobson had never overdrawn his account.

C. Estes testified, for the State, that he was familiar with the signature of R. B. Dobson. The signatures to the seventy-seven checks introduced in evidence as standards of comparison were genuine signatures of R. B. Dobson, but the signature to the alleged forged check was not written by Dobson. There was great uniformity in Dobson's signature. In none of the genuine signatures in evidence can it be found that the stem of the D extends above the body of the letter, as in the alleged forged signature, and while the small letters in the forgery somewhat resemble those in the genuine signatures, the "D" is separated from "obson," which is not the case in any of the genuine signatures. The witness had seen this alleged forged check before. When he first saw it there was not, as now, a small line extending from the top of the D to the o. showing an effort to connect the two letters as Dobson always connected them in writing his signature.

W. A. Hinds, ex-vice-president of the First National Bank of Baird, testified that the signature to the alleged forged check was not in the handwriting of R. B. Dobson. Ex-cashier Rushing, of the same bank, testified as did Hinds.

C. R. Corbett testified, for the State, that he and the defendant were members of the party that took Dobson's dead body to Baird, on January 16, 1888. En route the defendant remarked that Dobson owed him for some yearlings, and that he was afraid Dobson's death would render the collection of that debt troublesome and difficult. C. Stahl testified to the same effect.

J. E. W. Lane testified, for the State, that on the day Dobson's dead body was taken to town, which was January 16, defendant told him that he, defendant, and Dobson, on the evening of January 13, met about one hundred and fifty yards from Dobson's house, and had a settlement of the business and accounts then existing between them, and that no person was present at that meeting and settlement save themselves.

The State closed.

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Statement of the case.

Herman Schwartz testified, for the defense, that early in January, 1888, defendant came to his store in Baird and got him to calculate the interest on a promissory note. The said note was for about one hundred and fifty dollars, was payable to the defendant and purported to have been executed by R. B. Dobson. The witness was not familiar with Dobson's signature. The interest, according to the witness's recollection, amounted to about fifteen dollars.

J. P. Hill testified, for the defense, that in April, 1887, the defendant sold two brands of cattle to Dobson, the animals aggregating thirty-five or forty head in number. Cattle at that time were worth eight or nine dollars per head. Witness knew of that sale from information derived from both defendant and Dobson; also from the fact that he, witness, as agent delivered some of the cattle, and from the further fact that Dobson gave defendant five horses, at thirty dollars each, in part payment.

John Walker testified, for the defense, that on the Friday preceding the Monday on which Dobson's dead body was taken to Baird, he bought from defendant a cow which defendant was to get from Dobson. The witness, his brother Jesse and defendant then went to Dobson's place, four or five miles north from Baird. Dobson delivered the said cow, in the pasture, to defendant, and defendant, witness and Jesse Walker drove the cow to town. The price of that cow was eleven dollars. Witness saw no papers pass between defendant and Dobson on that occasion, and heard nothing said by either of them about a settlement.

Jesse Walker, testifying for the defense, corroborated his brother John, and stated in addition that, at the time he delivered the cow to defendant, Dobson put a paper on the horn of his saddle, wrote something on it, and then handed it to the defendant, with the remark: "The cow is eleven dollars, and that leaves the amount I owe you one hundred and fifty-four dollars." This witness stated that it was not true, as testified by John Walker, that when he, John Walker, came into the pasture, the defendant and Dobson and witness were holding the cow about one hundred yards from the pasture gate.

Being pressed by the State, on cross examination, the witness stated that he "guessed" the testimony of John Walker in this respect was true, and that the statement made by him, witness, was partly true and partly false.

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I. L. Merriam testified, for the defense, that in the summer of 1887 he remarked to defendant, in the presence of R. B. Dobson, that one of his, defendant's, JTL cows was at a certain place. Dobson remarked: "I now own that brand." Subsequent to that time he had heard Dobson inquire for cattle in that brand.

Testifying as experts, Mr. Rushing and Mr. Richardson stated that a person's handwriting would vary according to the position of the body at the time of the writing. A man would not probably write the same hand using a saddle horn as a rest that he would in writing on a table. Keeping this fact in view, they stated that they could not swear, by comparison, that R. B. Dobson did not sign the alleged forged check.

F. W. James, president of the First National Bank of Baird testified, for the defense, regarding the presentation of the check at the bank by defendant, and what then transpired, substantially as did the witness Powell, for the State. He stated further that, when he told defendant that if the check was in payment of yearlings he would pay it, and asked him the question if such was the fact, defendant replied that it was not, but was in settlement of an old debt. The witness did not suspicion the genuineness of the signature until after his attention was called to an apparent variance between it and the genuine signatures in the bank, and could not now testify that the signature was not genuine.

J. E. Thomas and *J. J. Vardeman*, for the appellant.

W. L. Davidson, Assistant Attorney General, and *F. S. Bell*, for the State.

HURT, JUDGE. This is a conviction for attempting to pass a forged order on the First National Bank of Baird, purporting to have been signed by R. B. Dobson.

Appellant presented the order to the bank for payment. Dobson had no money in the bank, or not enough to pay the order. The cashier called in the president and asked him if Dobson could overdraw, and the president said, in the hearing of appellant, that "Dobson has made an arrangement with the bank to borrow one thousand dollars, but has not given the required security; Dobson is going to buy yearlings with the money, and if this (the check) is for yearlings he can get the

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money." He then asked defendant if the check was for yearlings, and defendant said "no." Defendant then said that Dobson would be in town, either that day or the next day, and that he, defendant, would see him and settle the matter. Defendant did not return to the bank.

There are some strong circumstances tending to show that Dobson executed the check. On the other hand, quite a number of witnesses swore that the signature to the check was not Dobson's.

It seems that Dobson died about this time or a day or two afterwards. If dead at the time the check was presented, there was no evidence showing that appellant was aware of it. There is not the slightest proof that Dobson did not authorize appellant or some one else to write and sign his name to the check.

Under this state of case we think the evidence fails to support the verdict. If appellant knew the check to be a forgery, he certainly would not refuse to tell a lie, that being all that was required to procure the money. The check, if forged, was in itself a falsehood. This, the appellant knew. If guilty, why halt or refuse to utter another falsehood if his purpose was fraudulent?

The act of appellant being diametrically opposed to guilt, we must rather infer innocence from the circumstances tending to show that Dobson signed the check; and that the witnesses who swore that the signature was not his were mistaken, or that Dobson had authorized its execution. This inference is the only one by which all the facts in the case can be reconciled and made to harmonize.

Because the evidence is insufficient to support the verdict, the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

Opinion delivered May 22, 1889.

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No. 6237.

WILLIAM POWERS *v.* THE STATE.

1. PRACTICE—CONTINUANCE—BILL OF EXCEPTION.—Unless presented by a sufficient bill of exception, the ruling of the trial court refusing a continuance will not be revised on appeal.
2. SAME—DISQUALIFIED JUROR.—A brother-in-law of the person alleged in the indictment to be the person injured by the act of the defendant is not a competent juror on the trial of the latter.

APPEAL from the District Court of Coryell. Tried below before the Hon. C. K. Bell.

This conviction was for horse theft, the penalty assessed by the verdict being a term of seven years in the penitentiary.

The rulings of this court do not involve the facts proved on the trial.

Crain & Halbrook, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. A considerable portion of the brief of appellant's counsel is devoted to a discussion of the supposed error committed by the court in overruling the defendant's application for a continuance. No bill of exception having been reserved to the ruling, this question is not before this court for revision. (Willson's Crim. Stats., sec. 2187.)

One of the jurors, S. R. Tippit, was a brother-in-law to J. T. Morgan, who, by one of the counts in the indictment, was alleged to be the owner of the stolen horses. When the qualifications of the jurors were tested, they each, in answer to the question as to relationship to the person injured by the commission of the offense, answered—Tippit among the rest—that they were not related. It transpired, however, that Tippit was deaf, and either did not hear or did not understand the question, and his relationship to J. T. Morgan was unknown to defendant and his counsel until after the trial and conviction. As soon as ascertained, it was made one of defendant's grounds for his motion for a new trial. It was error upon this ground

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Syllabus.

to overrule the motion. The juror was manifestly incompetent and disqualified by our statute from sitting in the trial of the case. (Code Crim. Proc., art. 636, subdivision 10; Wright v. The State, 12 Texas Ct. App., 163; Page v. The State, 22 Texas Ct. App., 551.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered May 22, 1889.

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No. 6231.

W. H. BROOKIN v. THE STATE.

1. PERJURY.—A false statement under oath, to constitute perjury, must have been deliberately and wilfully made, the accused at the time knowing it to be false. A false statement under oath, if made through mistake, is not perjury.
2. SAME—EVIDENCE—CASE STATED.—When previously arraigned for trial for cattle theft, the accused applied, under oath, for a continuance for want of two absent witnesses, whose absence, he averred in his application, was not by his procurement or consent,—and this averment in the said application is the perjury assigned in this case. On this trial it was proved that, several days before the case for cattle theft was called, the defendant told the said witnesses that he would not need them on his trial; that they need not attend, and they were excused by him from attending that trial in his behalf. To meet this evidence the defendant offered to prove by the witness B. that, after he had excused the said witnesses, and before the theft case was called for trial, he directed the said B. to countermand his agreement excusing them from attending and testifying in his behalf on the trial, and to require them to be present as witnesses in his behalf; that, being himself confined in jail, he could not attend to the matter himself, and B. promised but failed to do as directed by him. This proof was excluded upon objection of the State. *Held*, error, inasmuch as it tended to show, and, if true, did show, a false statement under oath made by mistake.
3. SAME.—CHARGE OF THE COURT on a trial for perjury is fundamentally erroneous if it fails to instruct the jury that a conviction for perjury can not be had except upon the testimony of at least two credible witnesses, or of one credible witness strongly corroborated by other evidence, or upon the accused's confession in open court, as to the falsity of the statements under oath.

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Opinion of the court.

APPEAL from the District Court of Jones. Tried below before the Hon. J. V. Cockrell.

This conviction was for perjury, and the penalty assessed by the verdict was a term of five years in the penitentiary.

The opinion sufficiently discloses the case.

No brief on file for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE PRESIDING JUDGE. On the trial of appellant upon a charge of theft of cattle, he made an application, under oath, for a continuance for two absent witnesses, Moses Dameron and H. K. Jones, and amongst other things, in said application, stated that said witnesses were "not absent by the procurement or consent of defendant." He was indicted in the case under consideration for perjury, the matter assigned as perjury being the statement so made by him with regard to the absence of said witnesses.

On the trial it was proven by the State, by the witnesses Dameron and Jones, and also by other testimony, that they did not attend the theft trial after they had been summoned as witnesses, because, some days before said trial, appellant had told them that they need not attend the trial; that he would not need them, and he excused them from attendance as witnesses in his behalf. To meet this evidence defendant proposed to prove by R. P. Brookin that after he, defendant, had excused said witnesses, and before the theft case was called for trial, defendant told said R. P. Brookin "to see the witnesses Dameron and Jones and countermand his order releasing them, and tell them to be at the district court as witnesses for him." This R. P. Brookin promised to do, but never did; defendant himself being in jail, and unable to see the witnesses in person, nor had he seen R. P. Brookin from the time he requested him to see said witnesses until after the application for continuance had been made on account of their absence. On objection by the State, this testimony was excluded. In our opinion the court erred in excluding the evidence because it tended to show, and if true did show, that the statement assigned as perjury would not be a false statement deliberately and wilfully made—the defendant at the time knowing it to be false (Penal Code,

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Statement of the case.

art. 188), but, on the contrary, was a false statement made through mistake, which is not perjury. (Penal Code, art. 189.)

In his charge to the jury the learned judge omitted to instruct them that a conviction for perjury could not be had unless upon the testimony of at least two credible witnesses or one credible witness strongly corroborated by other evidence, as is required by article 746, Code of Criminal Procedure. The Assistant Attorney General confesses error upon this point, and the error is fundamental. (Washington v. The State, 22 Texas Ct. App., 26; Miller v. The State, ante, 497.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered May 22, 1889.

No. 6331.

JOHN KEGANS v. THE STATE.

1 THEFT—CONSPIRACY—CHARGE OF THE COURT.—On a trial for theft the trial court charged the jury as follows: "When two or more persons conspire together to commit an offense, and each carries out the part agreed to be done by him, and such offense is actually committed, then all parties to such an agreement are equally guilty of such offense; and if the jury believe from the evidence, beyond a reasonable doubt that the defendant fraudulently took the property charged to have been stolen, as given you in charges Nos. 1 and 2, and that defendant and others agreed or conspired, before or after such taking, to prove a purchase or pretended purchase of said cattle, either before or after such taking, this would be no defense to such fraudulent taking." *Held* that, under the proof on the trial (for which see the statement of the case), the charge was not erroneous.

2. SAME.—See the opinion for the substance of proposed testimony for th defense *held*, in view of the other proof in the case, to have been neously excluded.

APPEAL from the District Court of Haskell. Tried below before the Hon. J. V. Cockrell.

The first count of the indictment charged the theft, and the second the illegal branding, of two head of cattle, the property

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of S. J. Pate. The conviction was had upon the second count, the penalty assessed being a term of two years in the penitentiary.

Hiram Gilbert was the first witness for the State. He testified that in October, 1886, he was an employe of the "LIL outfit," at that time engaged in a "round-up" on Lake creek, in Haskell county. Some time during the said October, the defendant came to the camp of said "outfit," and asked the boys to look out for a JSP cow, which, he said, he either had bought or traded for. The witness could not now remember whether defendant named J. S. Pate or Mike Kegans as the party from whom he "got" the said cow. That evening's round-up included a JSP cow and calf. Defendant put his brand,—the letter D above a bar,—on the cow, but witness could not remember, whether or not he branded the calf, nor did he remember whether or not the defendant barred out the JSP brand. This occurred on Lake creek in Haskell county, Texas, in October, 1886.

William Word testified, for the State, that he was one of the "round-up" party referred to by the witness Gilbert. Two of the animals included in one day's "round-up" were a JSP cow and her calf. Defendant claimed the said cow and put his brand on her. The same brand was put on the calf, but witness could not say that the defendant was the man who put it on the calf. Witness asked the defendant where he got the cow, and he replied that he got her from Bud Pate. On cross examination the witness said that it was his recollection that defendant said he got the cow from Bud Pate, and that he could not remember that defendant mentioned Mike Kegans's name. As a rule it was commonly understood on the range that a person purchasing a cow on the range gets the calf of that cow if it transpires that she has one. Re-examined, and subsequently recalled by request of the jury, the witness stated positively that defendant told him that he got the cow from J. S. Pate, and did not mention Mike Kegans's name in that connection.

S. J. Pate testified, for the State, that he lived in Shackelford county, Texas. The witness, his wife and their children owned the JSP brand of cattle, which said cattle were under the care, management and control of the witness. Witness had never given authority to any person to sell or use any of said cattle. In June, 1887, the witness learned, through a letter from his wife, that defendant had branded a JSP cow, and he went to

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Statement of the case.

Haskell county to see about it. On reaching the town of Haskell, witness met Mike Kegans, whom he told that he wanted to see defendant. Mike went off and in a few minutes returned with defendant. Upon meeting witness the defendant asked: "Did you get that letter about the JSP cow of yours that I branded?" Witness replied in the negative, when he asked witness what would satisfy him for the cow and calf. Witness replied: "Another cow and calf." The defendant then agreed to give witness a certain cow and calf, and took witness to see the animals. Witness rejected those animals, and Mike Kegans agreed to pay witness for his cow and calf by giving him three yearlings. He paid witness two of those yearlings, but had never paid him the third.

Cross examined, the witness said that he stopped two nights in Shackelford county with a "cow outfit," of which Mike Kegans and Payt. Parker were members. This was in the summer of 1886. On one of those nights the camping place was on Bluff creek, and on the other at the "7W" ranch. The witness denied that, on either of those nights, he told Mike Kegans, in the presence of Payt. Parker, that he, witness, had a JSP cow in Haskell county, and that he wanted said Mike Kegans to get up and sell the said cow, so that he, witness, could get something for her. At that time the witness had sold to the WOO Cattle Company all the JSP cattle he could gather, and did not know that he had an animal in that brand in Haskell county. Witness also denied that at the "7W" ranch, about a year before the date of this offense, he told the defendant, in the presence of Jimmie Payne, that he, witness, had a JSP cow in Haskell county, and that he wanted defendant to get her up for him. He did tell the defendant on that occasion that he had a steer in Haskell county, and that he wanted him, defendant, to send that steer to him, witness, to be shipped with the "7W" cattle. The witness came from Shackelford county to Haskell county to testify before the grand jury about this case, deputy sheriff L. F. Tucker coming with him. He did not, on that trip, tell the said Tucker that he did not know what the grand jury wanted with him unless it was about the cow defendant got; that he had told defendant and Mike Kegans to look after his cattle in Haskell county, and that he had given them permission to sell his cattle. Witness never authorized defendant to put his, defendant's, brand on any of his, witness's, cattle. The defendant and Mike

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Statement of the case.

Kegans were brothers, and were cousins of the witness. The witness and the Kegans boys had worked the cattle range together for a long time, and had branded cattle for each other.

Deputy Sheriff Tom Tucker testified, for the State, that the defendant was not in Haskell county at the time this indictment was found, nor until about two months before this trial. He was engaged in "cattle working," and "cattle workers," unless in charge of a good steady job, rarely ever remain long in one county.

The State closed.

R. W. Barrett testified, for the defense, that in December, 1886, he and defendant were partners in the butcher business in Haskell county, Texas. About that time the witness delivered to the defendant a certain sorrel horse, and directed him to trade off the said horse for cattle. That horse passed out of the possession of the witness, and defendant brought five head of cattle into the business. The witness only knew from the statement of Mike Kegans and the defendant what the defendant did with the horse, and what cattle he obtained, and from whom he obtained them. On his cross examination the witness said that he was a deputy sheriff at the time this bill of indictment was found. Defendant was not then in Haskell county, but, as the witness understood, was at work on the "7W" ranch. On re-examination the witness said that, some time after the indictment was returned, he received a letter from the defendant asking if it was true that he had been indicted for cattle theft, and stating that, if true, he wanted to return to Haskell county to meet the charge.

Jimmie Payne testified, for the defense, that about a year before the date alleged in this indictment he met the defendant and S. J. Pate at the "7W" ranch. He heard a conversation between defendant and said Pate, in the course of which, as well as witness could remember, Pate told defendant to get a steer and other cattle of his, Pate's, then running in Haskell county, and send them to him in time to ship them with the WOO cattle.

Tom Tucker testified, for the defense, that, as deputy sheriff, he took S. J. Pate from Shackelford county to Haskell county, under attachment to go before the grand jury in regard to theft charged in this indictment. On the way S. J. Pate said to witness: "I don't know what the grand jury wants with me unless it is about the cow that John (defendant) got. I told John

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and Mike Kegans to look after my cattle in Haskell county, and let me know about them." He also, in the same conversation, said something about having authorized the Kegans boys to sell his cattle, but witness, who at that time was tired, sleepy and inattentive, did not understand what he said about it—whether he gave or withheld his consent for the Kegans to sell his said cattle.

Amos Coffman testified, for the defense, that about the middle of September, 1886, he witnessed a trade between the defendant and Mike Kegans. That trade occurred in the town of Haskell. Defendant gave Mike Kegans a certain sorrel horse, for which Mike gave him five head of cattle, including a JSP cow, by range delivery.

On his cross examination, the witness said that he once lived in Barber county, Kansas, where he passed under the name of A. S. Coffman. He had never been arraigned in the district court of Barber county, Kansas, nor convicted in that court of forgery. The witness was not the Amos S. Kaufman alluded to in the copy of the judgment of the district court of Barber county, Kansas, now placed in evidence, which said judgment recites the conviction of Amos S. Kaufman for forgery, and the assessment against said Amos S. Kaufman of a term of one year in the penitentiary of Kansas.

The defense closed.

In rebuttal, the State proved by his honor, the presiding judge, by J. E. Cockrell, E. J. Hamner, H. R. Jones and Oscar Martin that, on a previous and different proceeding in this court, the witness Amos Coffman testified that he was the identical Amos S. Kaufman alluded to in the copy of the judgment of the district court of Barber county, Kansas.

E. J. Hamner, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE PRESIDING JUDGE. Most of the questions so earnestly and ably presented in the oral argument and brief of counsel for appellant are of a character not likely to arise at another trial of this case, and consequently will not be discussed by us.

Serious complaint is made of the sixth paragraph of the charge of the court to the jury. It is claimed that there is no evidence in the case authorizing, much less calling for, such an

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instruction, and moreover it is contended that said instruction is not abstractly correct as law. We are not prepared to say that the charge was not called for by the evidence; on the contrary, there was evidence tending to show that defendant and other parties conspired to fix up and prove a purchase of the animal after it was taken possession of by defendant. And whilst the said instruction is awkwardly expressed, perhaps, we are clearly of opinion that, when critically scanned, the doctrine it announces is a correct principle in law. We do not think said instruction is obnoxious to either of the objections urged to it.

We are of opinion, however, that the court erred in excluding the testimony of the witness Barrett, as shown by defendant's bill of exceptions No. 2. Barrett and defendant were partners in the butcher business. Barrett authorized defendant to trade a certain horse of his for cattle. Defendant proposed to prove by Barrett that he, defendant, had told Barrett that he had traded said horse to one Mike Kegans for five head of cattle, four of which had been delivered, and that the other was a JSP cow, running upon the range. Defendant also proposed to prove by Barrett that Mike Kegans had also informed him, witness, of the same facts.

In explaining his ruling in excluding this evidence the learned judge places it upon the ground that defendant's statements to Barrett were made before he was charged with the theft, and that when his right to the animal was first questioned he gave a different account of his ownership. We take a different view of the matter. Defendant explained to Barrett how he had traded the horse, and what cattle he had traded him for. This was just after he had made the trade and when he first asserted any claim or ownership of the animal in question. It was in fact an explanation of his right to the possession of the animal, though that right may not have been then controverted or called in question. As to the conflict in the account he then gave and that subsequently made by him, it seems that in the first instance he claimed to have purchased it from Mike Kegans, and in the second, to have gotten it from Pate, the owner. This discrepancy may be reconciled by the fact that Mike Kegans claimed to have gotten it from Pate and sold it as Pate's agent to defendant, and in this light it may be said that defendant got it from Pate.

The importance of Barrett's testimony is apparent, especially

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in view of the fact that the jury, after they had been in retirement some time considering of their verdict, came into court and asked to have him recalled to the witness stand, to know if he had not stated in evidence "that one of the cows John Kegans bought for him was a JSP cow on the range." In answer to their request the court replied that the evidence had been excluded from their consideration, it being inadmissible. Because of error in the exclusion of this evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered May 22, 1889.

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27 709
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No. 6321.

LEO CAHN v. THE STATE.

1. PRACTICE—ORGANIZATION OF PETIT JURY.—The record shows that of the sixty jurors drawn on the special venire (the trial being for a capital felony) but fifty were served, and that of the fifty served but thirty-three were present at the organization of the trial jury. The defendant moved the court that, before he be required to proceed with the selection of a jury from the thirty-three veniremen present, he be awarded process to compel the attendance of the absent seventeen veniremen who had been served. The trial court overruled the motion, the defendant excepted and moved that he be awarded either compulsory process for the said absent veniremen who had been served, or a postponement of the trial until their presence could be secured. The thirty-three veniremen who were present were then examined on their *voir dire*, and of their number four were impaneled on the jury, and the court ordered a special venire for talesmen, returnable instanter, to which action of the court the defendant excepted, and again moved for compulsory process for the seventeen absent veniremen who had been served, which exception and motion were overruled. The defendant then moved that before requiring him to select a jury from talesmen, the court should call and tender him the regular panel of jurors drawn for the week by the jury commissioners; which motion was also overruled. *Held*, that in each of the said rulings the trial court erred.

2. DYING DECLARATIONS—PREDICATE.—As a predicate for the introduction of the dying declarations of the deceased, the State proved that when he made the declarations the deceased was sane, was conscious of impending death, and that he made the said declarations volun

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Syllabus.

tarily and not in answer to questions calculated to lead him to make any particular statement. *Held*, that the predicate was sufficient.

3. PRACTICE—EVIDENCE.—A State's witness testified that he arrested the defendant on the day of the shooting and near where it occurred, but was unable to state what length of time had elapsed since the shooting occurred. The defense, on cross examination, proposed to prove by the witness the statement made to him by defendant, when arrested, about the shooting. The proposed proof was excluded as no part of the res gestæ. *Held*, correct.

4. SAME.—The testimony of the defense tends to show that about the time of the fatal shooting the defendant claimed that the deceased was indebted to him a sum of money. It also shows that the employment of the defendant as the business manager, bookkeeper and confidential agent of the deceased terminated in June, 1887. In rebuttal of the defendant's claim of money due him by the deceased, the State introduced in evidence, over objection of defendant, a promissory note executed by the deceased in favor of the defendant, dated June 2, 1887, which showed by defendant's indorsement to have been paid, and also a receipt, executed on the same day by the defendant, acknowledging the payment in full by deceased of all claims then due. *Held*, that the trial court did not err in admitting the said note and receipt in evidence.

5. SAME.—During the progress of the trial the defendant's counsel requested permission of the court to consult a State's witness with reference to the testimony he would give in the case. The court granted the request, but the witness refused to disclose his testimony to the counsel, and the latter moved the court to compel the witness so to do. The court refused the motion, and the defendant excepted. *Held*, that the ruling was not error.

6. MALICE—CHARGE OF THE COURT.—As a general definition of malice, the trial court instructed the jury as follows: "Malice means a settled purpose or intention to seriously injure or destroy another." *Held*, erroneous.

7. SAME.—In view of the evidence, the trial court erred in omitting to instruct the jury that, if defendant provoked the contest with deceased, but not with the intention of killing or doing him serious bodily injury, he would not, by such provocation, be wholly deprived of the right of self defense, but that in such case self defense might be availed of by him to the extent of reducing the degree of homicide to a grade less than murder.

8. SAME.—See the statement of the case for special instructions which, in view of the evidence, were erroneously refused by the trial court.

9. PRACTICE—TRANSCRIPTS ON APPEAL.—See the opinion for suggestions of this court to trial courts and counsel with regard to the preparation of transcripts for appeal.

APPEAL from the District Court of Dallas. Tried below before the Hon. R. E. Burke.

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Statement of the case.

The indictment in this case was filed on the thirteenth day of April, 1888. It charged the appellant with the murder of M. Benedikt, in Dallas county, Texas, on the twenty-second day of March, 1888. The trial, which was had at the February term, 1889, of the district court of Dallas county, resulted in the conviction of the appellant for murder in the second degree, a term of ten years in the penitentiary being the penalty assessed against him.

Doctor G. E. Peters was the first witness for the State. He testified, in substance, that on the twenty-third day of March, 1888, he was summoned, in his professional capacity, to the store of M. Benedikt & Co., on the southwest corner of Elm and Poydras streets, in the city of Dallas, Texas. Near the head of the stair case, in the rear room of the second story, the witness found Mr. Benedikt, whom he had not hitherto known, lying on the floor, suffering from a gun shot wound in the back of the neck. The ball struck about one inch to the left of the medium line of the neck, passed upward and slightly forward, and struck the posterior portion of the bone known as the "atlas," which is the first bone of the spinal column on which the skull rests. From the said bone the ball deflected downward and lodged in the soft part of the neck, about an inch below the "atlas." The first effect of such a wound would be a severe shock and concussion; then, on even a slight motion of the head, death. Its instantaneous effect, the witnes thought, would be to knock a man down, and Benedikt, in this instance, must have fallen as soon as shot. Witness reached Benedikt within fifteen minutes after he was shot, at which time Benedikt was partially conscious. With the exception of the few minutes devoted to his dinner, the witness remained throughout that afternoon with the wounded man. Benedikt recovered his consciousness after the witness reached him, and awakened to a full realization of his condition. He said repeatedly that he was dying—that he was virtually a dead man. He made a statement about the shooting at various times before his death, at which times he was perfectly sane, and realized the mortal nature of his wounds. His statement so made was voluntary, and was not made in answer to any questions propounded by anybody, calculated to lead him to make any particular statement. (Touching the mental condition of the deceased at the time he made the declarations about to be proved by the State, this witness, and all others who testified thereto, were sub-

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jected, by the defense, to an exceedingly rigid cross examination, which, however, in view of the ruling of this court on the question of predicate, it is not necessary that this report should follow. And it may be here remarked by the Reporters that the statement of facts, which covers two hundred and forty-four pages of the record, is colloquial in form and appears to be a literal transcript of a stenographic report of the proceedings on the trial. In reducing the testimony of the witnesses to the narrative form, in order to compress it within reasonable limits, details must be sacrificed to the succinct statement of the material facts proved.)

Continuing his testimony, the witness said that the first remark made by Benedikt, after witness reached him—and he was then lying on the floor—was: "I am a dying man." He repeated those words at short intervals until he was placed on a box, and repeated them several times after he was placed on the box, and in connection with his repetitions of those words after he was placed on the box, he several times said: "He shot me! Cahn shot me! He said: 'I must have money; I am desperate, and unless you sign these papers I will kill you. I have come prepared to kill you unless you sign these papers.'" These repeated statements were made on Friday afternoon, being the afternoon of the day on which the shooting occurred, and they were reiterated, in substance, while witness was present on Saturday and on Sunday morning. He died about noon on Sunday. After deceased made the said statement the first time, on Friday evening, the witness asked him where he and the deceased were at the time of their conversation preceding the shooting. He replied: "In the front room."—which would be the room fronting on Elm Street. The witness then asked him where he was when he was shot. He replied that he was running. The wound in the neck of deceased was necessarily a mortal wound, and was the cause of his death.

On his cross examination, the witness said that he had no recollection of being asked by Mr. Clint (of counsel for the defense) on the examining trial if he, witness, knew anything about the dying declarations of the deceased. He denied that in reply to such question he told Mr. Clint that in connection with Doctors Leake and Graham he was attending upon the wounded man, and was not prepared to say anything about dying declarations. He admitted that he did testify at some time during the examining trial that he was not prepared to make any

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statement about a dying declaration, but he did not say or intimate that he did not hear any dying declarations. He denied positively that, in answer to a question by Mr. Clint, he testified on the examining trial that his whole attention was directed to the dying man, and that he paid no attention to what was said by him, and that others present might possibly be able to tell him, Clint, what declarations, if any, were made by the dying man. Witness remembered that Mr. Clint asked him on the examining trial what the dying man said, but witness refrained from answering that question because he did not want to tell him, Clint, at that time he, Clint, being an attorney in the case. Witness would not have told any other attorney at that time what he knew about the said declarations. He did not want to reveal his knowledge until he was called to testify on the final trial. The witness could remember the name of but one person who was present when deceased made the declarations stated. That man's name was Menczer. Another person was in the room, but witness could not remember who he was. Doctor Leake came while witness was bending over the deceased, and told witness that he, Leake, was deceased's family physician. Witness at once tendered him the entire charge of the case. Doctor Leake was in the room during the larger part of that afternoon, and was in the room at one or more of the times when the deceased made the statement testified to by witness.

Deceased, when witness first reached him, was lying on the floor in the back room up stairs, at the end of the stair railing, which point was about twenty feet from the head of the stairway. There were three rooms up stairs in that building, connected by ordinary doorways. There was no door in one of those doorways, and witness was not sure that there was one in the other. Quite a number of Jews, including Emil Kahn, the son-in-law of deceased, were in and out of the room on Saturday. Doctor Chapman was also in and out of that room at intervals on Saturday, as he was on Friday after the shooting occurred. Witness was not acquainted with Philip Brown, nor did he know that he was acquainted with Freidenburg, and could not say that either of them was among the persons present in the store on Friday. Witness did not know Wallenstien, and could not say that he saw him with the wounded man on Friday. Doctor George F. Lack, Mr. Beck and Mr. Schiffman were in and out during Friday. The conclusion reached by

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the attending physicians was that the wound was necessarily fatal, but witness may have stated to outside parties, immediately after he examined the wound that the result was uncertain. If he did, it was because he did not care to go on record at that time. Moreover, at that time the medical conferees differed in opinion as to the locality of the ball, and until that point was absolutely settled the witness did not want to express a positive opinion.

Doctor E. M. Chapman, Rabbi of the Jewish church in Dallas, of which the deceased was a member, was the next witness for the State. He testified that he reached the deceased soon after he was shot. Deceased was unconscious when the witness reached him, but recovered his consciousness about two and a half hours later. A bed was arranged on a goods box, and, about three hours after the wound was inflicted, the deceased was taken up from the floor and placed on the bed. He at that time appeared to realize his condition, and, in the opinion of the witness, was sane of mind, and he was in that condition when, his wife having left him, he made a statement to witness. The witness asked him no question calculated to lead to any particular statement, but did ask him: "Have you anything to say to me?" The deceased then made a voluntary statement, which the witness wrote on a pocket handkerchief. At this point the witness produced the pocket handkerchief, and declared that the writing thereon was written by him, witness, and that he wrote the words as they fell from the lips of the deceased. This occurred at twenty-five minutes past three o'clock on the afternoon of Friday, the day of the shooting. Directed by the court, the witness read the writing on the handkerchief as follows: "Cahn shot me. He said: 'You must die here or sign these papers. I am desperate without money.'"

On his cross examination the winess said that he reached the deceased between twelve and one o'clock, at which time Doctor Peters was in attendance upon the wounded man. No person was immediately present when deceased made the statement written by witness on the handkerchief, but two or three, whom witness could not recall, were in the room at the extreme end, twenty or twenty-five feet away. The witness was with Benedikt on Friday evening, Friday night, and Saturday, but not Saturday night, and not again until after his death on Sunday. The writing on the handkerchief was not

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signed by deceased. The witness did not think the deceased was able to sign it, and did not ask him to; and, moreover, did not regard the signature as necessary. The witness denied that deceased, at any time after he was shot, said, in his, witness's, hearing: "I would not have taken Cahn up stairs if my temper had not got away with me." Before making the statement reduced to writing on the handkerchief by witness, the deceased made a substantially similar statement to Doctor Peters, which Doctor Peters wrote down on a strip of paper. The statement on the handkerchief embodies every word said by deceased to witness about the shooting. He at no time told the witness that if it had not been for his, deceased's, violent temper, the shooting would not have occurred. Witness was with deceased throughout Friday night, but had no recollection of seeing either Wallenstien or Phillip Brown on that night. Two or three young men whose names were unknown to witness were there on Friday night. Witness could not say that Mr. Coulton was or was not one of them. Max Ortlieb was one of the parties who sat up with deceased on Friday night. What talking was done by deceased after he was shot was in a feeble, husky voice, and those to whom he talked bent over him to hear. His words could not be distinguished at any distance.

Doctor H. K. Leake was the next witness for the State. He testified that he was called to attend the deceased, and reached him about an hour after he was shot. He was then lying in a room in the second story of his store at the corner of Elm and Poydras streets. He was shot in the back of the neck. The ball of a large sized pistol entered about an inch to the left of the spine; passed upward and forward until it struck the first bone of the spine, which it shattered to fragments. The post mortem examination of the deceased disclosed several of the fragments of the bone pressing on the spinal marrow. Such a wound would infallibly and instantly knock a man down, and with regard to this case the witness was satisfied that deceased did not and could not have walked a step after receiving the shot. The witness and Doctor Peters attended deceased until his death, which occurred about noon on Sunday—the second day after the wound was inflicted. Witness was not present when deceased died, having left him about ten o'clock. Deceased was perfectly sane of mind during the entire time that witness saw him. He was not unconscious at any time that

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witness saw him, but, although in a state of collapse, he was rational and conscious.

S. Schiffman testified, for the State, that he was the proprietor of the jewelry store on Elm street in Dallas, immediately opposite the clothing store of M. Benedikt & Co. The shooting of Benedikt occurred a few minutes after twelve o'clock on the twenty-third day of March, 1888. Defendant was in the witness's store about fifteen minutes before the shooting occurred. He was at the witness's store when the witness left, at exactly twelve o'clock, to go to dinner and had then been there perhaps five minutes. He said something about wanting to see Emil Kahn, the son-in-law of the deceased,—that he was waiting there to see Emil Kahn.

Cross examined, the witness said that, at the time of the shooting, he had known the defendant eighteen months or two years. Defendant was not then in business, and was in the habit of calling at the witness's store to chat with witness. When he came to witness's store at noon on the day of the shooting, he said something about his intention of going to Benedikt's store according to an appointment, but witness could not recall his words. The witness observed nothing peculiar about the manner or appearance of the defendant. Deceased and witness had been acquainted about three or three and a half years, and witness was familiar with the deceased's reputation for truth and veracity in the neigborhood of his residence, which reputation was bad. So far as the witness knew, the reputation of the defendant for peace and quietude was good, but witness could not say that he had ever heard his character in that respect discussed. He has heard as many as three people impugn the character of deceased for truth and veracity.

W. N. Coe testified, for the State, that he was a deputy sheriff for Dallas county at the time Benedikt was shot. Witness reached deceased about ten minutes after the shooting. He found Benedikt in the up-stairs back room of his store, lying on the floor, groaning, and apparently suffering great pain. Dr. Leake reached the deceased a short time after the witness did. The witness found, on a box in the room up stairs fronting on Elm street, a check, a note, a small bottle of Arnold's ink and a pen. He took the check and note away with him, and started off with the pen and ink, but, as he has since been unable to find the said pen and ink, he was unable to say

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Statement of the case.

whether or not he took them away from the store. At this point the State read the note in evidence as follows:

"$100

"DALLAS, TEXAS, Mch. 23, 1888.

"Thirty days after date we promise to pay to the order of L. Cahn one hundred dollars at the bank of Flippen, Adoue & Lobit, Dallas, Texas, with interest from maturity at the rate of ten per cent per annum, and ten per cent additional for attorney's fees in case of legal proceedings to enforce collection. For value received.

"No..... Due.....

_____."

The check referred to by the witness was then read in evidence by the State, as follows:

"No....

"DALLAS, TEXAS, March 23, 1888.

"*Flippin, Adoue & Lobit*, Bankers:

"Pay to L. Cahn or bearer one hundred twenty-two and 50-100 dollars.

"$122 50.

_____."

The means by which the witness discovered the said documents were as follows: When he reached deceased, he asked deceased who shot him, and deceased replied: "He told me if I didn't sign those papers he would kill me." The witness went immediately into the room and found the note and check. They were on a box not more than ten feet from the front of the building.

On cross examination the defendant's counsel called the attention of the witness to a publication in the Dallas News of March 24, 1888, which purported to be a statement made by him to a reporter of the said newspaper, about the killing. The witness stated that he presumed he was interviewed by the reporter of that paper. The counsel then read from the said paper the following, which purports to be a part of the witness's said statement to the reporter of the said paper: "I went into the back room and on a table I found the papers (note and check) of which you have copies." With reference to this the

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witness stated that he knew it was a box and not a table on which he found the note and check. According to the Dallas News report the witness said: "These are the papers I found on the prisoner." With reference to this, the witness stated that he remembered making no such statement. According to his recollection, he told the News reporter that a policeman arrested defendant. As a matter of fact, witness did not arrest defendant, and took no papers from his person. He found the note and check on the box, as stated. Two or three persons were present when the deceased replied to witness's question, "who shot you?" but witness could not say that Doctor Chapman was one of them, though he saw Doctor Chapman about the store while he, witness, was there. Witness remembered that Benedikt's voice was feeble, but did not remember that he, witness, did or did not stoop over to hear what he said.

Henry Waller testified, for the State, that he was on the Dallas police force at the time Benedikt was killed. He arrested the defendant on Lamar street, the defendant then going from the direction of the Texas & Pacific railroad depot. This was after the shooting, but witness could not tell how long, as he did not hear the shots fired. About the time witness arrested defendant, Policeman Beard came up and asked defendant what he had done with his pistol. Defendant replied that it was in his pocket, and Beard took it from his pocket. The witness observed that some of the chambers of the pistol were empty.

Policeman Dick Beard testified, for the State, that he aided in the arrest of the defendant, and at the time took from him the British bulldog pistol now produced by the witness. Some of the chambers—witness did not remember how many—were empty when he got the pistol from defendant. He did not remember that he examined the pistol to see if it had been recently discharged.

Cross examined, the witness said that the arrest of defendant was made by him and Waller about five minutes after the shooting. Witness did not recollect that, when he arrested defendant, the defendant said that Benedikt "cursed, abused and insulted him, struck him with a stick, and turned to get a box top with which to brain him," and that for that reason he shot Benedikt. Just as Waller arrested defendant, witness asked: "What is the trouble?" and either defendant or Waller replied that it was done "with a pistol," and witness put his

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hand in defendant's pocket and got the pistol. Defendant made no statement whatever to witness at the time of the arrest, beyond the fact that he "did it with a pistol"—and it may be that that statement was made by Waller and not by him.

H. L. Hancock was the next witness for the State. He testified that at the time of the shooting of the deceased he was in the employ of the deceased as a salesman in his, deceased's, clothing store, which was situated at the southeast corner of Elm and Poydras streets, in Dallas, Texas. The witness was standing just outside of the front door when the defendant entered that store a few minutes before the shooting. He did not know from which direction the defendant came, as he did not see him until he was in the act of entering the door. As he went in he asked witness if Emil Kahn was in, and went on; but when he reached a point about ten feet inside of the store he turned back and again asked witness if Emil Kahn was in. The witness replied that he did not think he was; that it was his impression that said Kahn had gone to dinner. He then asked witness if Benedikt was in, and witness replied that he was. Defendant then walked on toward the rear of the store. Witness stepped out of the store, and was outside when he heard the firing of a pistol. He thought at the time that the noise was made by somebody striking the sidewalk on Poydras street, and accordingly he looked down Poydras street, but, seeing nothing, and hearing somebody coming down the stairs, he went back to the door. He then saw Mr. Engeldow, a clerk in the store, coming down the stairs. Engeldow called to witness, and about that time defendant came down the stairs with a pistol in his right hand. Four or five minutes after that the witness went up stairs and found Mr. Benedikt lying on the floor, face down, about twelve feet distant from the head of the stairway, his head pointing toward the stairway. The witness heard three reports of a pistol. At that time he was standing about eight feet distant from the point immediately under the front up stair room. The up stair room, when witness reached the head of the stair, was filled with smoke that did not issue from the stove, and that smelled of powder.

Examining Mr. Benedikt, the witness found that he had been shot behind the burr of the ear. One of the balls passed through one of the south windows of the room about six feet from the floor. Defendant said nothing to witness when he came down stairs, and made no remark that witness heard as

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he passed out of the store. The witness did not see him put up his pistol. Mr. Engeldow and witness were the only persons in the store on the ground floor at the time of the shooting. Engeldow had not got all the way down stairs when the witness started after a policeman. The defendant was in the employ of M. Benedikt & Co. when the witness entered their service in November, 1886, but was not in their employ at the time of the shooting. Emil Kahn was in the employ of M. Benedikt & Co. at the time that defendant was, but he worked in the Globe Clothing House—another establishment that belonged to M. Benedikt & Co. After defendant left the firm, Emil Kahn went to work in the Elm street house. Emil Kahn usually went to his dinner about half past eleven o'clock. It was his custom to leave the store by the front door and go east on Elm street. He could be readily seen leaving the store by anybody standing in the door of Schiffman's jewelry store on the opposite side of the street. The shooting occurred about twenty minutes after twelve o'clock. Emil Kahn got back to the store from his dinner about fifteen minutes after the shooting. The witness was familiar with the handwriting of the defendant, and, upon inspection of the note and check in evidence, declared them to be in the handwriting of the defendant. The witness had seen those papers before this trial, but not on the day of the shooting. He was not in that part of the building where they were said to have been found until some time after the shooting. The window through which one of the balls passed could not be seen by a person standing in any part of that room—the front room in which the check and note were said to have been found—unless he stood immediately in the doorway. The witness had never seen any writing material in that room. The business desk of the establishment was down stairs at the rear end of the store.

On cross examination the witness said that when he entered the employ of Benedikt in November, 1886, the defendant was in the store as bookkeeper and general business manager. He continued to serve the deceased in that capacity until June, 1887. Emil Kahn's usual time of going home to dinner was half-past eleven o'clock, but it was at a somewhat later hour that he left the store to go to dinner on that day. Witness could not state the exact time he left, but it was near twelve o'clock, and it was about a quarter past twelve when defendant entered the store. A person standing at Schiffman's store

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would have no difficulty in seeing a person leave Benedikt & Co.'s store on Elm street. The parties who were in Benedikt's store when defendant went in were Messrs. Lee, Engeldow, Benedikt and Lazarus—the latter being a merchant who resided at Plano. Lazarus sometimes bought goods from Benedikt & Co., but witness could not say what, if any, business he was transacting on the day of the shooting. Witness did not know what Lee was then doing in the store. He was not then in the employ of the house, but was on friendly terms with the clerks, and, a short while after the killing of Benedikt, entered the service of the house. He quit working for the house on January 5, 1889. The witness could not indicate the point in the store where Engeldow was when defendant entered the store. If, when he came down stairs after the shooting, the defendant asked witness where he would find a police officer to whom he could surrender, the witness did not hear him. He said nothing whatever at that time that the witness heard, but witness had been informed since the shooting that, as he passed out of the store, the defendant said something to Engeldow about giving himself up. Menczer's saloon was on Poydras street, in the rear of M. Benedikt & Co.'s store, Hodge & Hoya's real estate office intervening. After meeting defendant at the front door, as defendant entered the store, the witness went to Menczer's saloon and got a glass of beer—taking a hat off a dummy figure at the corner of the store as he went. He had just got back to the dummy and replaced the hat when the first shot was fired. The shooting sounded to witness like the pounding of the sidewalk on Poydras street at a point near the barber shop, about one hundred and twenty feet from the corner. Witness stepped to the corner, looked down the street, and then entered the store at the front door, and met Engeldow between the cash drawer—which was about forty feet from the door—and the stairway. Engeldow said that Benedikt had been shot, and told witness to go after a policeman, and witness started off to find one. If, as witness was informed, defendant, when Engeldow told witness to go for a policeman, said: "No, you need not go. I will give myself up," the witness did not hear it. It was after this that witness and Menczer—witness following immediately behind Menczer—went up stairs. Witness did not remain up stairs at that time, but returned immediately to the ground floor, and afterwards went to the jail to see the defendant. Witness was not under the influence of

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liquor at the time of the shooting, and had then taken but one glass of beer, and, perhaps, a drink before breakfast on that morning. He drank to some excess on the evening after the shooting. The witness was still in the employ of M. Benedikt & Co. Witness saw no weapon of any kind on or near Benedikt's person, nor did he find any after the shooting when he cleaned the rooms up stairs. He cleaned those rooms about three o'clock on the day of the shooting. A great many persons had been in and out of those rooms before they were cleaned.

Mr. Engeldow testified, for the State, that now and at the time of the shooting, he was in the employ of M. Benedikt & Company, at their clothing store on the corner of Elm and Poydras streets in Dallas. The shooting of M. Benedikt occurred between twelve and one o'clock on March 23, 1888. The witness was in the store when the defendant came in, just before the shooting. Emil Kahn had gone to dinner. Hancock at that time was standing just outside of the front door, and, besides witness and Benedikt, Mr. Lee and Mr. Lazarus of Plano, were in the store. Defendant said nothing to witness as he passed through the store going back to where Benedikt was. Witness did not see the meeting betweenBenedickt and defendant, and heard nothing they said to each other. He saw them go up stairs a few minutes later, and about five minutes after they went up stairs the shooting took place. Three shots were fired, a rustling noise, like somebody running, intervened between each of the said shots. The person appeared to be running from the front toward the rear of the building. The witness then ran to the head of the sairs and saw Benedikt lying, face down on the floor, and defendant standing over him snapping a pistol. He snapped that pistol at Benedikt's prostrate body as many as two or three times that witness saw. Benedikt at that time was doing nothing but lying on his face. He had no pistol, knife, or other weapon in his hand. Benedikt was never moved from the up stairs of his store until after his death. Witness attended upon him, dressed his wounds and visited him at intervals until his death, and never saw a knife or pistol about him, nor anywhere up stairs.

After discovering defendant and Benedikt in the positions described, the witness went down stairs, and about the time he reached the foot of the stairs, defendant appeared at the head of the stairs, pistol in hand. He came on down and walked

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out of the house at the front door with his pistol still in his hand, remarking as he passed witness that he would give himself up. Some time elapsed before the witness went back up stairs, at which time there was no smoke visible. Witness saw but one wound on Benedikt's person, and that was in the back of the neck. He saw what he took to be a bullet hole in one of the south windows. He had never seen that hole before, though he was frequently up stairs and about that window. Benedikt, at the time he was shot, had been back from New York but few days.

On cross examination the witness was asked if he did not know, as a matter of fact, that what he had testified to be the snapping of the pistol at Benedikt's prostrate body, by the defendant, was merely the nervous twitching of the defendant's hands? He replied that he had no such knowledge, and that he did not see defendant's hand move at all. The witness testified on the examining trial of the defendant, but did not recollect whether he then testified about hearing a rustling noise, between the shots, like a person running from the front to the rear of the building. Witness spoke to defendant while he was standing over Benedikt snapping his pistol, but defendant did not respond. After he came down stairs defendant said that he was going to give himself up, but said nothing in the hearing of the witness about having shot Benedikt in self defense. The witness was in the store, five or six feet from the front door, when defendant entered, and was still at that point when the defendant and Benedikt went up stairs. Hancock, a few moments before, was standing outside and in front of the front door. Witness did not know positively where Lee was, but thought he was standing by the stove, fifteen or twenty feet from the foot of the stairs. When defendant and Benedikt went up stairs, Lee was at the foot of the stairs, blacking his shoes. Lazarus was somewhere about the stove with Benedikt when defendant came into the store. Lee entered the service of the house as a clerk in April, after the death of Benedikt.

On his redirect examination the witness stated that the firm's business office was down stairs, and that no writing desk nor writing material was kept up stairs. After the shooting the witness rode to Benedikt's residence in a buggy, and back, and then went into a front room up stairs, in which room, on a box, he saw a small bottle of ink, a pen and some papers. This was before Coe went into the room. He did not

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examine the papers, and could not identify them in the check or note now in evidence. The witness had never seen the bottle of ink and the pen prior to that time.

Re-cross-examined, the witness said that his duties kept him at work both up and down stairs. He had charge of the reserve stock up stairs and it was a part of his work to keep that stock arranged. The larger part of his time was spent at work down stairs. No pen and ink was kept up stairs for use in marking goods. A pencil was generally used in marking goods. When it was deemed necessary to use a pen and ink for that purpose, they were taken up stairs from the office, and were taken back to the office afterwards. The bottle of ink witness saw up stairs on the day of and after the shooting was of a very common shape, size and style in general use, but no such a one had ever been about Benedikt's store that witness was aware of. The witness did not know when nor by whom the pen and ink were taken up stairs.

Mr. Lee was the next witness for the State. He testified that he was in Benedikt & Co.'s store, near the office, in the back part of the ground floor of the building, when defendant entered, and he witnessed the meeting between defendant and Benedikt. Mr. Lazarus, of Plano, came to the office a few minutes before defendant did, and entered into conversation with Mr. Benedikt. Lazarus retired a very few minutes after defendant came to the office. Benedikt, who had been back from New York but a few days, and defendant shook hands and exchanged greeting in an apparently friendly and cordial manner. Defendant then said that he wanted to see Benedikt on business. Benedikt said: "All right." Defendant then said: "Let's go up stairs." Benedikt said "all right," and they went up stairs, defendant in advance, and Benedikt following. The witness then left the store, and did not hear the shooting.

On his cross examination this witness stated that it was impossible for him to state how long it was after he left the store that the shooting occurred, except that it was not long. On his way back to town he encountered Emil Kahn, and, referring to the excited movement of people, asked him: "What is all this rush about?" Emil Kahn replied: "The old man is shot."

At the time the shooting occurred, the witness was bill clerk at the Dallas steam laundry, and had been in Dallas since the twenty-sixth day of the preceding November. He went to Benedikt's store on the day of the shooting, about noon, to buy

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a pair of pants. He bought those pants from Hancock, a very few minutes after twelve o'clock, put them on, and went to the foot of the stairs to polish his shoes. He was polishing his shoes when defendant came to the office, and when he and Benedikt went up stairs, they passed witness at the foot of the stairs. Witness got through polishing his shoes about the time they passed him, and left the store, went to dinner, and was returning to his work when he was overtaken by Emil Kahn, who was going towards the store. The defendant and Benedikt met near the office, not more than ten or fifteen feet distant from where the witness was. The witness's attention was particularly attracted to the men by the ardor of their greeting—a peculiarity of the Hebrew race. He stopped blacking his shoes and looked at them for a few moments, and resumed work on his shoes about the time they started to go up stairs. Lazarus left within a very few moments after defendant joined Benedikt. Witness remembered nothing said by Lazarus except that he asked Benedikt how he enjoyed his trip east and how he found business in New York. Witness could remember nothing said by defendant or Benedikt before Lazarus left, except that defendant asked Benedikt about the same questions Lazarus did about his trip east. Defendant's counsel asked witness: "When Cahn came in didn't you hear Benedikt say to him: 'Where have you been? I have been hunting all over town for you.' And did not Cahn reply: 'I have been in town but did not know you were in town. I only got your word this morning?' Did not Lazarus about this time say: 'I will come in this evening and see you about getting my goods?'" Witness answered that he heard no such conversation between the parties. The witness went to work for M. Benedikt & Company on April 26, 1888, and remained in their service until January 5, 1889. He was not in the employ of Emil Kahn, but that of M. Benedikt & Company—the firm name under which the business continued to be conducted after the death of M. Benedikt.

The State closed.

Doctor William Lack was the first witness for the defense. He testified that he lived in the city of Dallas, and by profession was a barber and chiropodist. He had known the defendant since 1884, and during the year immediately preceding the killing of Benedikt he and defendant had boarded at the same house and taken their meals at the same table. Defendant was

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also a regular customer of the witness, having his shaving done at the witness's shop. The witness was familiar with the defendant's reputation for peace and quietude, and knew it to be good. The witness was also well acquainted with M. Benedikt, having known him since his removal to Dallas from Terrell, about two years before his death. They were fellow members of the same Jewish lodge, the witness being president and Benedikt, at the time of his death, vice president of the same. Witness, as such president, detailed members of the lodge to attend Benedikt after he was shot. He detailed Philip Brown and Sam Coulton on Friday night, and Harry Frees and B. Freidenburg on Saturday night. Between three and four o'clock on the afternoon of Thursday—the day preceding the shooting—Benedikt came into witness's barber shop at the St. George Hotel, and asked witness if he had recently seen defendant, and if defendant was in town. Witness replied that defendant was in town, when Benedikt said: "He has been dunning me for money. I want you to tell him when you see him that I have been looking for him." When witness went to his boarding house that evening he met defendant and delivered Benedikt's message, but did not repeat to him Benedikt's statement about defendant dunning him. The witness knew as a matter of fact that defendant carried a pistol on his person for some time prior to the killing of Benedikt, and it was commonly and generally known that one Heidingsfelder who, at one time clerked for M. Benedikt & Co., had repeatedly uttered threats against the life of defendant. Defendant, to witness's knowledge, knew of those threats. The witness, for one, told him about them.

On cross examination by the special counsel for the prosecution, the witness said that as a professional chiropodist he was a doctor of sore feet, ingrowing nails and corns. The Jewish lodge, of which the witness and Benedikt were members at the time of the latter's death, and of which they were respectively president and vice president, was known as "Brith Abraham." Witness's barber shop and chiropodist office was in the St. George Hotel. It was reached by passing through the main office of the said hotel. Witness's shop contained three barber chairs, but at the time of the killing he had but one tonsorial assistant, whose name he could not remember. He was a white man, and, like barbers, a "roustabout"—that is, a man who often changes his place of work and residence. No per

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son was in witness's shop when Benedikt came in and shaved on the day before he was shot. Mr. Benedikt was a regular Saturday evening customer. In the conversation on that evening Benedikt said that he had been to his old "Globe" clothing house looking for defendant. If he mentioned any other place to which he had been, witness did not remember it. He did not say when he inquired at the "Globe" for defendant. He did not say when defendant dunned him for money, but merely that defendant had been dunning him, and that he had been looking for defendant. Witness told defendant at the dining table, at their boarding house, that Benedikt had been to his shop looking for him, defendant, and had asked him, witness, to tell him, defendant, that he, Benedikt, was looking for him. and wanted him to come to the store. Witness could not remember that any person other than himself and defendant was then at the table. Another or others may or may not have been sitting at the table. Heidingsfelder's threat, uttered in the hearing of the witness, occurred in this wise: It was generally known that hard feelings were entertained by Heidingsfelder against defendant, and it was generally discussed by the several persons at the dining table of the house where defendant boarded. Meeting Heidingsfelder on Elm street one day, the witness remarked: "I hear you have been having a little fun; that you have been let out of the Globe house," He replied: "Yes, I am going to get square with the son-of-a-bitch." The witness did not personally repeat to defendant this threat of Benedikt, but he, defendant, was at the boarding house where all the boarders were talking about it.

M. Staum testified, for the defense, that he clerked for M. Benedikt & Co. for the nineteen months preceding February 1, 1888, on which date they sold out the "Globe" clothing house. During those nineteen months witness worked first at the "Syndicate" or Elm street house of Benedict & Co., and then at the "Globe" house, and continued to work at the latter after the said sale. Witness saw Benedikt on the morning of and before the shooting occurred. He came into the Globe about eight o'clock on that morning and asked witness: "Did you see your old friend this morning?" Witness asked him: "Who do you mean?" He replied: "Leo Cahn." Witness said in reply: "It is yet too early for him. He usually comes here, but not this early." Benedikt then said to the witness: "If you see him tell him that I would like to see him about noon." He

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spoke in a somewhat rapid and excited manner. The defendant came to the "Globe" store between ten and eleven o'clock, and witness told him that Benedikt had said he wanted to see him about noon. The witness and one Heidingsfelder were fellow clerks in the service of M. Benedikt & Co. at one time, and at that time the defendant was the general manager of M. Benedikt & Co.'s business, and was also book keeper and "confidential man." Defendant quit Benedikt & Co. in 1887, and went to New York for somebody, but witness could not now say for whom. He owned a pistol at the time he quit the service of Benedikt & Co. He had been warned and cautioned to be at all times prepared to defend himself against Heidingsfelder, who at various times had uttered threats against his life. During the absence of defendant in 1887, Heidingsfelder said to witness: "If Cahn ever comes back here from New York and I see him, I will kill the bastard son of a bitch!" The witness communicated that threat to the defendant as soon as he got back, and warned him to be at all times prepared to defend himself. Defendant's reputation for peace and quietude had always been good.

Cross examined, the witness said that the conversation with Heidingsfelder referred to in the examination in chief occurred on Elm street in Dallas. The witness could not remember that Doctor Lack or anybody else was present. In addition to the threat to kill the "bastard son of a bitch," etc., Heidingsfelder said something about defendant having talked about him to Benedikt and about having uttered threats against him, Heidingsfelder. Emil Kahn was manager of the Globe clothing house in the winter of 1887, when witness and Heidingsfelder were clerking there. When defendant came into the Globe house on the morning of the shooting, the witness, after delivering Benedikt's message to him, advised him not to go to the store in response to the invitation. Witness thought some of the clerks in the Globe store heard this conversation, but was not certain. A man named Michaels, who clerked in the Globe house at the the time, but who was now supposed to be in San Antonio, was present when witness told defendant, on his return from New York, of the threats of Heidingsfelder, and advised him to be prepared to defend himself. Defendant bought a pistol in March or April, 1887, which was previous to any threats by Heidingsfelder that witness had any knowledge of.

S. Lazarus testified, for the defense, that he lived in the town

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of Plano, where he was engaged in the mercantile business. Witness was in Dallas on March 23, 1888, and about noon that day went to the clothing store of M. Benedikt & Co., corner of Elm and Poydras streets, to buy a bill of goods if he could get them on suitable terms. He went to the back part of the store, near the stove, where he met Benedikt whom he had not seen since his return, a few days before, from New York. Within five or ten minutes defendant entered the store, came to where witness and Benedikt were, saluted both and entered into a conversation with Benedikt. Benedikt told defendant that he had been looking or waiting for him for three or four days: Defendant replied: "I heard you wanted to see me, but I did not know until last night that you were here." They continued to talk, but in so low a tone that witness, who made no attempt to listen, heard nothing they said. He understood enough to know that they were discussing business matters, and accordingly he turned to leave the store. Just as the witness started to leave, Benedikt said to defendant: "I want to see you up stairs." Witness then left, remarking to Benedikt that he would return after dinner.

On his cross examination, the witness said that he was acquainted with Lee, the man who entered the service of Benedikt & Co. after the death of Benedikt, but he did not know him at the time of the shooting. He did not see Lee in Benedikt's store on the day of the shooting. He did not see anybody but defendant come into Benedikt's store while he, witness, was there, and he at no time observed a man at the foot of the stairs blacking his shoes. The witness was satisfied that, if a man had been at the foot of the stairs blacking his shoes at the time defendant joined witness and Benedikt near the stove, he would have seen him. The witness did not see Benedikt and defendant go up stairs, but, just as he left the store, he heard Benedikt propose to defendant to go up stairs. Witness did not, on the day previous to this testimony, tell Lee that he, witness, left the store before Benedikt and defendant went up stairs. Benedikt did not tell defendant, in the presence of witness, why or for what he had been looking for defendant.

O. P. S. Fee was next introduced by the defense. He testified that he had known deceased between twelve and fifteen years, during which time his reputation for truth and veracity was good. At this point defendant asked the witness: "Have not you stated on the streets forty dozen times that Benedikt's

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reputation for truth was notoriously bad?" Upon the State's objection the question was ruled out.

Henry Waller, recalled, testified, for the defense, that he arrested defendant on Lamar street, which was beyond Elm street from the court house. He was then going down the middle of the said Lamar street towards Main street, from the direction of the Texas & Pacific railway depot. The point on Lamar street where the witness arrested defendant was about five hundred feet distant from M. Benedikt & Co.'s store, where the shooting was said to have occurred. To get to that point from the said store, the defendant would have traveled westwardly on Elm street to Lamar street, and then north along Lamar street, and in doing so he would have traversed crowded business thoroughfares. It was between twelve noon and one o'clock p. m., when the arrest was made. Witness did not hear the shooting and could not tell how long after the shooting it was that he arrested defendant. He, witness, was summoned from Main street, and, as he passed E. M. Kahn's establishment, somebody exclaimed: "Yonder he is, coming this way!" Beard appeared about the time witness arrested defendant, and Beard secured defendant's pistol, which the witness did not examine.

William Wallenstien testified, for the defense, that he reached the deceased about two hours after he received his wound and spent three or four hours with him that afternoon. He sat up with Benedikt on Saturday night, on which night Benedikt made statements to him in regard to the shooting. He said the defendant applied to him for money; that he had no money in the safe when defendant asked him to sign a check, but that, having no money in bank at that time, he refused; that, if he had known that defendant was armed with a pistol, he would not have struck defendant with a board; that he was trying to get a board to strike defendant when he was shot; that he had known defendant a long time and regarded him as an arrant coward, and had no idea that he would shoot.

On cross examination the witness said that he remained with Benedikt from seven o'clock on Saturday evening until seven o'clock on Sunday morning. It was about eleven o'clock on Saturday night that Benedikt made the statement detailed by the witness on his examination in chief. Messrs. Friedenburg and Harry Frees also spent Saturday night with Benedikt, but witness did not know whether or not they heard the statement

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made to witness by Benedikt. Mr. Benedikt called the witness to his bed side and made the said statement to him. The substance of that statement was that defendant first asked him for money, and then to sign a check; that he struck the defendant, and then attempted to get a board to strike him again, when defendant shot him; that he was sorry he struck him; that he would not have done so had he known that defendant had a pistol, and that he thought the defendant was too great a coward to shoot. He talked loud enough for witness to hear him, and witness would "guess" that others heard him. The witness did not remember to whom, if to anybody, he talked about this matter. In fact he tried to keep his knowledge secret, as he did not wish to be mixed up in this affair. Benedikt told witness that he owed the defendant some money, but did not say how much, nor how long he had owed it.

Mr. Friedenburg testified, for the defense, that he was one of the parties appointed by the Hebrew lodge to wait upon Benedikt on Saturday night. The gentlemen who served with him on that night were Mr. Wallenstien and Harry Frees. Benedikt talked to Wallenstien and witness, on Saturday night about the shooting. He said, in substance, that he very much regretted the occurrence, and that if he had known defendant was armed he would not have struck him. He said other things on that night, but witness did not remember them. On his cross examination the witness said that he thought he was alone in the room with Benedikt when the said statement was made, Frees and Wallenstien having stepped out of the room a few moments before. It was quite probable that the witness had told several parties about Benedikt's said declarations, but he could not recall the names of any of those parties. As a matter of fact witness had told several parties about it, but he could not name one. Witness did not remember that Wallenstien had ever told him of a declaration made to him, Wallenstien, by the deceased.

Philip Brown testified, for the defense, that he was a member of the Brith Abraham lodge, and was detailed to attend Benedikt on Friday night. Coulton, the other member detailed with the witness, and the witness went to the room where Benedikt was between seven and eight o'clock on that night. During that night deceased said to witness: "If I had not called Cahn up stairs this would not have happened. I struck Cahn, and turned around to pick up a piece of box board when

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he shot me." Cross examined, the witness said that Sam Coulton was in the room when Benedikt made the said statement to witness. Benedikt made other statements about the shooting, among them that he would certainly die. Witness could repeat nothing else. Detailing the statement referred to, witness said that, waking from a short sleep, deceased exclaimed: "O, me! If I had not called Cahn up stairs, this would not have happened." A moment later he continued: "He (Cahn) told me about the money I owed him, and I got mad and struck him, and then turned to pick up a board and he shot me." He did not say how much money he owed defendant, nor did he say what he struck Cahn with. Witness repeated this statement to several parties,—among them to Dr. Lack. He told Lack on the next day, or the day after. Witness did not know whether or not Emil Kahn was present when Benedikt made the said statements to him. Witness remembered seeing no other person than those mentioned on that night. Emil Kahn remained at the store with Benedikt but a short time on the said Friday night.

Dr. A. C. Graham testified, for the defense, that he reached Benedikt about two hours after he received the wound on Friday, and remained with him three or four hours. He saw Benedikt again on Saturday, and again on Sunday, a few hours before he died. The witness at no time heard Benedikt speak of the shooting. He did not talk about it while witness was with him.

Albert Hurst testified, for the defense, that Benedikt was a taller man than defendant, and would weigh thirty or thirty-five pounds more than defendant. He was a heavy built, and apparently a strong man. On cross examination, the witness said that he competed in business with deceased, but denied that, after the killing, he circulated a petition among the Hebrews of Dallas to destroy Benedikt's reputation for truth and veracity. He did not hunt witnesses for the defendant. He talked to Ben Iralson, but only with the view of obtaining information to satisfy his personal curiosity in the matter. The witness never heard of a petition for the discovery of witnesses to impeach Benedikt's character for truth and veracity being circulated.

Three or four other witnesses testified, for the defense, that deceased was a compactly built, strong man, weighing from

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one hundred and sixty-five to one hundred and eighty pounds—a much heavier man than defendant.

Max Kellar testified that, by employment of Emil Kahn, he waited upon Benedikt from Saturday morning until his death, during which time Benedikt made no statement whatever about the shooting in the hearing of the witness. Witness first saw Benedikt after the shooting, on Friday night.

Messrs. Franks, Starke, Sligh, Record, Meyer, Davis and Gunter, testifying for the defense, declared that the general reputation of M. Benedikt for truth and veracity was bad. Doctor Schiff testified that Benedikt was generally reputed to be an irritable, excitable and violent man, while defendant had always been esteemed as a peaceable man.

Defense closed.

W. H. Flippin was the State's first witness in rebuttal. He testified that he was the senior member of the firm of Flippin, Adoue & Lobit, bankers, Dallas, Texas. His attention was called to the following promissory note:

"$400. June 2, 1887.

"On Dec. 15, we promise to pay to the order of L. Cahn four hundred dollars at Flippen, Adoue & Lobits, bankers, Dallas. Value received.

"No.——. Due Dec. 18. M. Benedikt & Co."

Endorsed across the face: "Paid 12-17-87." Endorsed on the back: "L. Cahn." "Paid 12-17-87. Flippin, Adoue & Lobit, per W. M. Perry, collector."

The witness identified the signature "M. Benedikt & Co.," as genuine, and as the handwriting of M. Benedikt. He did not know that Benedikt & Company had money on deposit at the bank of Flippin, Adoue & Lobit, on March 23, 1888, but the check of Benedikt & Company for four or five hundred dollars would have been cashed at said bank at that time. The promissory note of June 2, 1887—the note in evidence—was discounted at the witness's bank, and the bank's signature of December 17, 1887, shows that it was paid on that day. At this point the following receipt was exhibited to witness and put in evidence:

"Dallas, June 2, 1887.

"Received from M. Benedikt & Co., the sum of four hundred dollars in note, and in book account of L. Cahn, of four hun-

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dred and ninety-three, which amount is full and complete settlement to date for any demand whatsoever, and for services rendered to the firm of M. Benedikt & Co.

"Book, $493.

"Note, $400.

"$893. L. Cahn."

The witness identified the signature as the genuine signature of the defendant.

On cross examination, this witness stated that, so far as he knew, the reputation of Benedikt for truth and veracity was good. It was good with the witness.

M. L. Hancock, recalled by the State, testified, in rebuttal, that he saw no blood or other evidence of a struggle about the person of defendant when the latter came down stairs just after the shooting. He did not afterwards find any planks or box boards, or other boards, up stairs displaced. There were no boards up stairs accessible that could be used to knock a man down with. Clothing was piled three feet high on all of the boxes save one, which was kept under a counter, and there was no top to that box. The boxes that had tops were nailed up.

Mr. Engeldow testified for the State, in rebuttal, that he saw no blood, bruise or other indication of violence on the person of defendant when he was snapping his pistol at Benedikt, nor after he came down stairs. Witness at no time saw any box tops or other kind of plank or boards lying about the floor or elsewhere up stairs, at the time nor after he saw defendant snapping his pistol at Benedikt.

Mr. Coe testified that when he went up stairs, soon after the shooting, he hunted for weapons but found none, nor did he see any box tops, plank, boards or scantling.

Officers Waller and Beard testified, for the State, that they observed no blood, bruises or indications of recent violence on the person of defendant when they arrested him.

Messrs. Friedlander, Kingdon, Jones and Hynson, testifying for the State in rebuttal, stated that Benedikt's reputation for truth and veracity was good.

The State closed.

M. L. Hancock was recalled by the defense, and in reply to questions propounded to him, said that if defendant was ever

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Statement of the case.

in the employ of Benedikt after June 2, 1887, he, witness, did not know it; that if the defendant went to New York to transact business for Benedikt & Co. after June 2, 1887, he, witness, did not know it; and that if the defendant purchased goods in New York for Benedikt & Co. he, witness, did not know it. The several articles of merchandise noted in the note book now exhibited to witness by defendant's counsel, were entered in Benedikt's handwriting, but if such articles were shipped by defendant from New York, and after June 2, 1887, were received by Benedikt & Co., witness did not know it. The entry in the note book was unsigned, and appeared to be a memorandum and not an order for goods.

On cross examination, the witness said that he knew the defendant to be indebted to M. Benedikt & Co. on January 18, 1888. Benedikt had entrusted to defendant for sale through the country a quantity of jewelry, and on the said January 18, asked him for a settlement. Defendant replied to Benedikt that he could not settle, as he had sold the goods on credit. Benedikt then asked him for a partial payment. Defendant replied to him: "You know damned well that I have sold the goods on credit and received no money for them." Witness heard no particular sum of money mentioned in that conversation. The witness knew nothing whatever about Benedikt's estate owing defendant a debt of two hundred and fifty dollars, secured by a lien on a house.

The defendant's special instruction number thirteen, referred to in the eighth head note of this report, reads as follows: "The defendant was justified in shooting Benedikt if in so doing he acted upon reasonable appearances of danger of death or of serious bodily injury to himself, which reasonable appearances the jury must consider and determine from Cahn's standpoint. It matters not in such case whether the danger was real, whether it in fact existed, or whether it was merely colorable. If from defendant's standpoint, taking into consideration all the circumstances of the case, amongst others the relative size of the men, it would reasonably appear to him that he was in danger of death or serious bodily injury from Benedikt, he had the right to kill him, although in fact such danger did not exist. Each juror must place himself in the place of the defendant, and determine from all the facts as they appeared to him at the time, whether his apprehension or

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fear of death or of serious bodily harm was reasonable; and if so you must acquit him."

The substance of special instructions fourteen and fifteen, referred to in the same head note, is stated as follows by the counsel for the defense: "The right of self defense having once accrued, it exists and continues until the danger, or threatened danger, which authorizes its exercise, is past. It must not be carried beyond the point necessary to secure defendant's safety, but the jury must place themselves in defendant's place and judge of the necessity from his standpoint, taking into consideration all the facts and circumstances and surroundings as they appeared to him at the time, and in this connection the jury may consider the sizes and strength of the two men. Even if the defendant carried his attack upon the deceased beyond the point necessary to his own safety; if he did it under the influence of sudden excitement or passion, produced by the assault against which he was defending himself and against which he had a legal right to defend himself, the killing would not be murder, but manslaughter, and the jury should so find if they believe that defendant went further than was necessary for his own defense; and upon this question he is entitled to the benefit of the reasonable doubt."

C. F. Clint, J. W. Thompson, D. G. Wooten and *R. B. Seay*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. With respect to the organization of the jury, the defendant assigns the following errors, each of which is presented by proper bill of exception, to wit:

1. The court erred in organizing the jury and in impaneling the same in the following particulars, to wit: In not granting appellant's motion to compel, by proper process, the presence of the seventeen absent jurors who had been drawn to serve on the regular special venire, and whose names appeared upon the list of said venire served upon defendant, before proceeding to form the jury, or compelling the appellant to select a jury from among the thirty-three special veniremen who alone, out of the sixty named in the list of the special venire, appeared and were present to be selected from.

2. The court erred in overruling appellant's motion to com-

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pel, by proper process, the attendance of the aforesaid seventeen absent jurors, respectively, as their names were reached on the list and called, or to postpone the further formation of the jury until their presence could be secured.

3. The court erred in not granting appellant's motion to compel, by proper process, the attendance and presence of said seventeen absent jurors, after the thirty-three, who were in attendance, had been exhausted and only four jurors selected, before proceeding further with the formation of the jury, and in not postponing the formation of the jury until the absent jurors could be procured or their absence accounted for, but in at once issuing a special venire for talesmen.

4. The court erred in refusing appellant's motion to call in the regular panel of jurors for the week, who had been regularly drawn by the jury commissioners of the county, after the special venire had been exhausted, and before issuing a venire for talesmen, because, under the law relating to the formation of juries in capital cases, the defendant is entitled to have all the jurors who have been drawn by the jury commissioners first placed in the box to be selected from, before ordering a venire of talesmen from the body of the county; and because the special venire ordered for the trial of this case was incomplete in that only thirty-three of the sixty special veniremen were present, though duly summoned to attend, and defendant's motions to compel their attendance had been overruled, and in such case the regular panel for the week should have been first placed in the box and drawn from before the issuance of a venire for talesmen.

Each of said assignments of error is fully sustained by the record, and is fatal to the legality of this conviction. We shall not consume much time in discussing these errors, as former decisions and statutory provisions make them manifest. We call to the attention of the trial judge to Osborne v. The State, 23 Texas Court of Appeal, 431; Weaver v. The State, 19 Texas Court of Appeal, 547; Thuston v. The State, 18 Texas Court of Appeals, 26.

As to the dying declaration of the deceased, we do not think there was error in admitting them. A sufficient predicate for their admission seems to have been established.

It was not error to refuse to permit the witness Waller to testify to what defendant said about how and why he killed the

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deceased. These statements of defendant were not made under circumstances constituting them *res gestae*, and were inadmissible.

It was not error to permit the State to read in evidence the receipt dated June, 1887, and the note of the same date for four hundred dollars. These documents were relevant, tending to throw light upon the business relations of the defendant and the deceased, and to show that the deceased was not indebted to the defendant, as claimed by the latter. It was within the discretion of the court to admit this evidence in rebuttal, and we think the court properly admitted it when so offered.

There was no error in refusing to require Emil Kahn to disclose to the defendant or his counsel what facts he would testify to. (Withers v. The State, 23 Texas Ct. Ap., 396.)

Numerous exceptions were reserved by the defendant to the charge of the court, and numerous special instructions were requested by the defendant, which the court refused to give, and defendant excepted. We shall not undertake to discuss each of the objections urged to the charge, but will merely, in a general way and briefly, state our conclusions.

1. The definition of malice given in the charge is not correct. There may be "a settled purpose or intention to seriously injure or destroy another," and yet no malice may exist in the mind of the person entertaining such purpose or intent, as in the case of a sheriff who executes a death warrant, or as in the case of a person who commits justifiable homicide in self defense. (Bramlette v. The State, 21 Texas Ct. App., 611; Harris v. The State, 8 Texas Ct. App., 90; McKinney v. The State, Id., 626; Pickens v. The State, 13 Texas Ct. App., 353; Hayes v. The State, 14 Texas Ct. App., 330.)

2. With respect to self defense, the court should, in view of the evidence, have instructed the jury that if the defendant provoked the contest with the deceased, but not with the intention of killing or doing him serious bodily injury, he would not by such provocation be wholly deprived of the right of self defense, but that in such case self defense might be availed of by him to the extent of reducing the degree of the homicide to a grade less than murder. (White v. The State, 23 Texas Ct., App., 154; Roach v. The State, 21 Texas Ct. App., 249; Thuston v. The State, Id., 245.)

3. We think the special instructions numbers thirteen,

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fourteen and fifteen, requested by the defendant, are applicable to and demanded by the evidence, and are correct in principle. They are a part of the law of the case, and it was material error to refuse them.

In other respects in which objections are urged to the charge, and to the refusal to give requested instructions, we hold no error was committed.

We will here take occasion to make some suggestions in regard to the preparation of cases for appeal. It is very desirable that a transcript on appeal should contain only such matter as is essential to an intelligible consideration and determination of the questions involved in the case, and this essential matter should not be unnecessarily repeated. Thus, where an application for a continuance has been overruled, and the defendant has excepted to the ruling, it is only necessary that the application should be inserted *once* in the transcript. Where the bill of exception sets out the application in full, it will be sufficient to insert the bill. So, it is unnecessary to except to the action of the court in overruling exceptions to an indictment, or in overruling a motion in arrest of judgment, or for a new trial, and the transcript should not be encumbered with exceptions of this kind. So, in the preparation of a statement of facts immaterial matter should be excluded. Only the material facts should be inserted, and as succinctly and clearly as practicable. Stenographic reports of the evidence, containing questions and answers, remarks of the reporter, etc., detailing every word spoken by the witnesses, as well as the remarks of court and counsel, should not be certified as a statement of facts.

We are induced to make these suggestions because of the unnecessary voluminous transcript in this case. It is a transcript covering five hundred and thirty-seven pages, when, in our judgment, if the case had been carefully and properly prepared for appeal, the transcript would not have exceeded one hundred pages. The statement of facts, furnished we presume by a stenographer, cover over two hundred pages, when every material fact proved on the trial could, we think, have been presented in a statement of thirty pages. Such voluminous, unwieldy transcripts require of this court much useless labor, and the consumption of valuable time, and frequently obscure the merits of the case. A very little care on the part of the coun-

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sel and the court in the preparation of cases for appeal, would relieve this court of a vast amount of unnecessary labor, and enable us to more readily and intelligibly dispose of causes.

Because of errors we have mentioned, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered May 25, 1889.

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A

ABANDONMENT.

If a party, intending to commit murder, uses a deadly weapon in such a manner as that his intention is apparent or may be fairly inferred from the fact, he can not, by abandoning any further attempt at violence, mitigate the effect of his previous act or intention; and it is for the jury to determine, under appropriate instructions upon the law, whether, by what he did before he abandoned the further execution of his plans, he really and in fact intended to commit murder. And if they find that he did so intend to commit murder, and the facts justify the finding, then this court will not interfere with the verdict. —*Wood v. State*, 393.

ACCESSORY.

See PRINCIPAL OFFENDERS.

1. Under the provisions of article 90 of the Penal Code, the principal offender, if in arrest, must be tried before his accessory can be tried; wherefore the motion of the defendant (who was charged as a principal), that the person charged as his accessory be first put upon trial was correctly overruled. *Williams v. State*, 466.

2. Inasmuch as an accessory, whose principal is in arrest, can not be tried and convicted until after the trial and conviction of the arrested principal, it devolves upon the State, in the trial of the accessory, to show the conviction of the principal. And to make such proof in this case, the court properly permitted the State to introduce in evidence the verdict and judgment of conviction rendered against the principal. *West v. State*, 472.

3. See the statement of the case in Williams v. The State, ante, 466, for evidence *held* sufficient to support the conviction of an accused charged as an accessory to theft. *Id.*

ACCOMPLICE.

See EVIDENCE, 14.

1. The second count of the indictment (being the count upon which this conviction was had) charges that certain persons, to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder one Ellick Brown, and that defendant, prior to the commission of said murder by said unknown persons, did unlawfully, wilfully and of his malice aforethought, advise, command and encourage said unknown persons to commit said murder, said defend-

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ACCOMPLICE—*continued.*

ant not being present at the commission of said murder by said unknown persons. It was objected to the indictment that it neither named nor gave a description of the unknown persons who committed the murder of Brown. *Held*, that the objection is not sound, and the indictment is sufficient, its purpose and effect not being to charge the unknown persons as the "accused" in this case, but to carge the defendant as an accomplice to the murder of Brown. *Dugger v. State*, 95.

2. The charge of the court in this case should, more explicitly than it did, have instructed the jury that, to convict, they must find that the defendant was not present at the commission of the murder, and that the murder was committed by a person or persons who had been advised, commanded or encouraged by the defendant to commit it. *Id.*

3. See the statement of the case for evidence *held* insufficient to support a conviction as an accomplice to murder. *Id.*

4. See the opinion in extenso for the charging part of an indictment *held* to comprehend but a single count, and to be sufficient to charge, the accused as an accomplice to murder. *Crook v. State*, 198.

5. In order to authorize the conviction of an accused, as an accomplice, it devolves upon the State to establish the guilt of the principal of the offense charged against him; and, to establish that specific issue (but not that the accused is an accomplice), any evidence is admissible that would be competent against the principal if on trial. Under this rule the trial court did not err in admitting proof of the confession of the principal; and, in limiting the purpose of such proof to the issue of the principal's guilt, the charge of the court was correct. *Id.*

ACCOMPLICE TO MURDER.

See ACCOMPLICE, 1–5.
CHARGE OF THE COURT, 24, 25.

ACCOMPLICE TESTIMONY.

See CHARGE OF THE COURT, 37.

1. See the statement of the case for evidence *held* insufficient to support a conviction for murder of the second degree because it rests upon the testimony of an insufficiently corroborated accomplice. *Stouard v. State*, 1.

2. If the proof tends to raise the question whether or not a State's witness is an accomplice in the offense on trial, can the trial court, in any state of case, refuse to submit to the jury the question of accomplice *vel non*, together with proper instructions upon the corroboration of accomplice testimony? If so, it must not only be because the proof that the witness is an accomplice is meagre, but because the other proof in the case tends strongly to show that he is not. The proof in this case farely mooting the complicity of the two State's witnesses, the trial court erred in refusing to instruct the jury upon the law of accomplice testimony. *Hines v. State*, 104.

3. Ownership, like every other material issue on a trial for theft,

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ACCOMPLICE TESTIMONY—*continued.*

must be proved by competent evidence, and if it rests upon the testimony of an accomplice such proof is insufficient unless legally corroborated. *Hanson v. State*, 140.

4. The rule that, in rape cases, requires that if the other proof in the case tends to raise the issue of the female's consent to the carnal act she becomes so far an accomplice that, in order to warrant a conviction based upon her testimony, she must be corroborated, applies to sodomy cases; and if the evidence tends to show the consent of the prosecuting witness to the act of beastiality committed upon him, he must be corroborated. The proof in this case tends strongly to show the consent of the alleged injured party, who, upon the main issue, wa the State's principal witness; and in failing to instruct the jury with regard to the corroboration of an accomplice, the trial court erred. *Medis & Hill v. State*, 194.

5. A conviction based upon the uncorroborated testimony of an accomplice can not stand. See the statement of the case for the substance of evidence *held* insufficient to support a conviction for hog theft. *Smith v. State*, 196.

6. See the opinion in extenso for evidence of a State's witness *held* insufficient to inculpate the said witness as an accomplice to theft. *Riley v. State*, 606.

ADEQUATE CAUSE.

See CHARGE OF THE COURT, 7.
EVIDENCE, 8.

ADULTERY.

1. Adultery is an offense which, under the present law of this State, can be committed in but one of two ways: 1, by the parties (one or both being legally married to some other person) *living together* and having carnal intercourse with each other; and, 2, by the parties having habitual carnal intercourse with each other without living together. To convict under the first mode the proof must show a *living together* of the parties, but need show no more than a single act of carnal intercourse, but under the second mode the carnal intercourse must be shown to have been habitual. *Bird v. State*, 635.

2. "Living together," though not defined by the code, means within the purview of the statute defining adultery, that the parties "dwell or reside together; abide together in the same habitation as a common or joint residing place." The conviction in this case is for adultery committed by the first mode, but the evidence, failing to show that the parties *lived together*, although it proves habitual intercourse, is insufficient to support the conviction. *Id.*

AFFIDAVIT.

See COUNTY JUDGE.

AGGRAVATED ASSAULT AND SAME AND BATTERY.

1. A husband has the right to defend himself against an assault

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AGGRAVATED ASSAULT AND SAME AND BATTERY—*continued.*

committed upon him by his wife, and, unless he employs greater force than is necessary to repel the violence of his wife, he can not be held guilty of an assault and battery. See the opinion for the substance of evidence *held* insufficient to support a conviction for aggravated assault and battery by a husband on his wife. *Leonard v. State*, 186.

2. See the opinion for the substance of evidence *held* insufficient to support a conviction for aggravated assault and battery because insufficient to support the ground of aggravation alleged in either of the counts of the indictment. *Stevens v. State*, 461.

3. The application for continuance shows that the defendant sued out as many as four subpœnas and one attachment for the absent witness, who was a resident of Dallas county, and alleged that by the absent witness he would prove that the alleged injured party was the aggressor, and that he struck said party only in defense. The testimony of the prosecuting witness was not only contradicted as to material matter by the witnesses for the defense, but they testified that the prosecuting witness cursed the defendant, and struck him before defendant struck the prosecuting witness, and that, when the defendant finally struck the two blows inflicted upon the prosecuting witness, he, defendant was retreating. *Held* that the diligence being sufficient, and the absent testimony being, in view of the proof, both material and probably true, a new trial should have been awarded. *Id.*

4. The aggravation alleged in the information was that the accused is an adult male and the injured party a female, and such allegation imposed upon the State the onus of proving that the accused was an *adult* male—a male person who had attained the full age of twenty-one years. But in a case of this character the proof need not show *in ipsissimis verbis* that the defendant was an adult. *Sufficient* that he is proved to have been a "man" and a "railroad hand," and that it was not controverted that he was an adult. *Henkel v. State*, 510.

5. Charge of the court instructed the jury as follows: "The intended injury may be bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind. The handling of a woman without her consent, in order to have undue familiarities with her, may produce such emotions without inflicting bodily pain or injury.' *Held*, correct. *Id.*

6. See the statement of the case for evidence *held* to have been improperly admitted because hearsay; and for evidence *held* insufficient to support a conviction for aggravated assault because it shows that the violence inflicted by the defendant was justified in resisting an illegal arrest. *Massie v. State*, 617.

ALIBI.

See CHARGE OF THE COURT, 9.

The only inculpatory evidence against the accused was the testimony of two witnesses to the effect that, subsequent to the theft of the property, they saw the same removed from a place of concealment by three parties, one of whom they believed, but were

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ALIBI—*continued.*

not positive, was the defendant. In anticipation of this evidence, the defendant applied for a continuance to secure a witness by whom to establish his presence at another place at the time the property was removed from the place of concealment. Being denied the continuance, and convicted, the defendant asked for new trial because of the ruling of the court upon his application for continuance. The new trial was refused upon the ground (as was the continuance) that the proposed alibi did not cover the time of the theft of the property. *Held*, that the action of the trial court was error, not only because of the inherent weakness of the inculpatory proof, but because an alibi is available, not merely to meet the main issue in the case, but any criminative fact relied upon by the State. *Taylor v. State*, 44.

AMENDMENT.

Appeal bond or recognizance for appeal must be entered into at the trial term, and can not be amended after an appeal has been perfected. *Koritz v. State*, 53.

APPEAL.

1. Appeal bond or recognizance for appeal must be entered into at the trial term, and can not be amended after an appeal has been perfected. *Koritz v. State*, 53.

2. Being convicted and fined in the recorder's court of Galveston city for a violation of a penal ordinance of the city, the defendant appealed to the criminal district court of Galveston county, by which court his appeal was dismissed on the ground that it had no jurisdiction of such municipal offenses, inasmuch as no right of appeal in such cases was conferred by the special charter of Galveston city, nor by the laws of the State, and because the offense was not against the laws of the State nor prosecuted in the name of "The State of Texas." *Held* that the appeal was erroneously dismissed. See the opinion in extenso for a collocation and construction of the various statutory provisions relevant to the question. *Bautsch v. State*, 342.

3. In all criminal cases tried before mayors and recorders of incorporated cities, the general policy and intent of the statutes of Texas secure to defendants a right of appeal commensurate with that from convictions in justices' courts. The fact that the special charter of a city wholly ignores such right of appeal from convictions for violation of the municipal ordinances can not frustrate the right of appeal from such convictions, notwithstanding the municipal offense consists in an act which is not penal under the general laws of the State. *Id.*

APPEAL BOND.

See APPEAL.

ASSAULT AND ASSAULT AND BATTERY.

The act of killing, in this case, necessarily included an assault and battery, and the charge of the court defining murder sufficiently

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ASSAULT AND ASSAULT AND BATTERY—*continued.*

embraced assault and battery, but the trial court, in addition, gave in charge an independent definition of assault and battery. *Held* material error because excepted to. Moreover it was matter calculated only to encumber the charge and confuse the jury. *Crook v. State*, 198.

ASSAULT TO MURDER.

1. An assault and a specific intent to murder are two elements which must concur in order to constitute the offense of assault with intent to murder. The intent must be established as an inference of fact to the satisfaction of the jury, but the jury may draw that inference, as they draw all others, from any fact in evidence which to their minds fairly proves its existence. *Trevinio v. State*, 372.

2. If the assault is voluntary, is committed with deliberate design, and with an instrument capable of producing death, and there are no extenuating circumstances, it is an assault with intent to murder. And "whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent." See the statement of the case for evidence *held* sufficient to support a conviction for assault with intent to murder. *Id.*

3. See the statement of the case for evidence *held* sufficient to support a conviction for assault with intent to murder. *Wilks v. State*, 381.

4. The essential ingredient of the offense of assault with intent to murder is that the assault was accompanied by the specific intent of the accused to murder, and this ingredient must be established to the satisfaction of the jury. *Wood v. State*, 393.

5. The offense of assault with intent to murder is proved when it is shown that, had death resulted from the assault, the offense would have been murder. Another test is that "if the assault is voluntary, committed with deliberate design and with an instrument capable of producing death in such manner as evidences an intention to take life, and there are no extenuating circumstances, it is an assault with intent to murder." *Id.*

6. The rule is statutory that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the forbidden act." And it is elementary that "a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears." *Id.*

7. If a party intending to commit murder, uses a deadly weapon in such a manner as that his intent is apparent or may be fairly inferred from the act, he can not, by abandoning any further attempt at violence, mitigate the effect of his previous act or intention; and it is for the jury to determine, under appropriate instructions upon the law, whether, by what he did before he abandoned the further execution of his plans, he really and in fact intended to commit murder. And if they find that he did so intend to commit murder, and the facts justify the finding, then this court will not interfere with the verdict. *Id.*

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ASSAULT TO MURDER—*continued.*

8. See the statement of the case for evidence held sufficient to support a conviction for assault to murder. *Id.*

ASSAULT TO RAPE.

1. The indictment in this case charged an assault to rape by force, and the allegation was supported by the testimony of the prosecutrix. The proof for the defense, however, not only contradicted her testimony materially, but tended to prove her consent. Upon this state of evidence the defense asked a new trial to produce newly discovered evidence strongly supporting the theory of consent. *Held* that, under the facts in proof, the new trial should have been awarded on the newly discovered evidence adduced by the defense. *Reed v. State*, 317.

2. To constitute the offense of assault with intent to rape by force, the offender must have committed an assault or assault and battery upon the female with the specific intent to rape by force, and the force thus intended must be such force as might reasonably be supposed to overcome resistance, taking into consideration the relative strength of the parties and the other circumstances in the case; and on a trial for assault with intent to rape by force the trial court must so instruct the jury. But see the opinion of Willson, Judge, dissenting from the ruling of the majority of the court, and holding that, though to constitute the offense of assault with intent to rape by force, the assault must be accompanied by the specific intent to rape by force, the character of the force intended is immaterial, and that it is not the duty of the trial court, upon a trial for assault with intent to rape by force, to give in charge to the jury the definition of "force," as prescribed by article 529 of the Penal Code. *Brown v. State*, 330.

ATTEMPT TO PASS FORGED INSTRUMENT.

See FACT CASES, 41.

B

BAIL BOND.

See RECOGNIZANCE, 1.

BILL OF EXCEPTIONS.

See CONTINUANCE, 5.

1. Bill of exception reserved to the charge of the court, if too general or indefinite to point out specific objection, will not be considered on appeal; and, in the absence of a proper bill of exception, this court will examine the charge of the court below only with reference to fundamental errors or such as, under all the circumstances of the case, are calculated to prejudice the rights of the accused. *Peace v. State*, 88.

2. Bill of exception to the admission of evidence must disclose the ground of objection; otherwise it is not entitled to be considered on appeal. *Hughes v. State*, 127.

3. In this case the trial court charged upon an issue depending upon

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BILL OF EXCEPTIONS—*continued.*

the evidence. The defendant excepted to the charge because it was unwarranted by any evidence in the case. In his authentication of the bill of exceptions, the trial judge recites that there was no such evidence adduced on the trial, and that the evidence referred to in the charge was evidence adduced on the trial of another case. The statement of facts does contain evidence which would warrant the charge, but, as the bill of exceptions controls, the charge must be held erroneous as unauthorized by any evidence on the trial. *Briscoe v. State*, 198.

4. Objection to evidence admitted on the trial will not be considered by this court when not presented by proper bill of exception. *Wilks v. State*, 381.

BURDEN OF PROOF.

See EVIDENCE, 1.

When the State has established against the accused a *prima facie* case of guilt, it devolves upon the accused to establish the facts upon which he relies to excuse or justify the forbidden act. *Stilly v. State*, 445.

BURGLARY.

1. Indictment for burglary charged that the house was entered with the intent to commit theft, but fails to charge that the entry was made with the fraudulent intent to take the property from the possession of the owner; and the allegation of theft fails to charge that the property was taken from the *possession* of the owner. *Held* insufficient to charge the offense. *O'Brien v. State*, 448.

2 Two of the articles taken from the burglarized house are described in the indictment as a "Canadian quarter of a dollar coin and a Mexican quarter of a dollar coin." Two such coins were produced in evidence by the State, and the court admitted the testimony of an officer that they looked like coins he got from unknown parties after the arrest of defendant; that he did not know from whom he got them, and that he did not get them, nor coins like them, from defendant. *Held* that this evidence in no way traced the said coins to the possession of defendant, and was erroneously admitted. *Mann v. State*, 580.

C

CARRYING PISTOL.

1. Whether the accused was "a person traveling" and therefore exempt from the operation of the statute denouncing the offense of carrying a pistol, is a question of fact for the determination of the jury. *Shelton v. State*, 443.

2. A fugitive from justice, while fleeing the country, is not "a person traveling," within the exception of the statute forbidding the carrying of a pistol. *Id.*

3. "A person traveling" is a person exempt from the operation of the statute defining the offense of unlawfully carrying a pistol.

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CARRYING PISTOL—*continued.*

It is shown in this case that the defendant, with his family in a wagon, left his home in the Indian Territory to go to B., in Cooke county, Texas, via G. in the same county; that he arrived at G. after night and stopped at a wagon yard, where he left his wagon and family, to go into town for the declared purpose of hiring a conveyance to continue his journey that night, but that he was arrested in a gambling room on that night with a pistol on his person. *Held*, that while en route from the Indian Territory, and while in the wagon yard in G., and while on the streets of G. to procure a conveyance, or for any other lawful purpose connected with his journey, he was "a person traveling" within the meaning of the statutory exception, but such exception can not be held to protect him while frequenting the gambling room. *Stilly v. State*, 445.

4. A defense witness testified that, about a month before the alleged offense, the accused had a difficulty in the Indian Territory with one Phelps; that Phelps made an unsuccessful attempt to obtain a weapon with which to kill the accused, and afterwards told the witness that he, Phelps, was "going to Gainesville and fix himself, and that he and Jim Stilly never could live in the same country," which threat the witness communicated to the accused. Upon this proof the defense requested the following charge: "The law authorizes an individual to carry on his person a pistol, who has a reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. To justify such apprehension, it is not necessary that the danger should in fact exist, or that the person threatening should be present, or in view of the defendant at the time of carrying the pistol, but it is only necessary that the facts and circumstances should be of such a nature as to excite a reasonable apprehension of danger so imminent and threatening as not to admit of the arrest of the party threatening an attack." *Held* that the danger contemplated by the statute was not proved, and the instruction was properly refused. *Id.*

5. The information charged the appellant with carrying a pistol only, and the evidence on the trial related to the carrying of a pistol only; notwithstanding which the trial court charged the jury with reference to the carrying of a dagger, dirk, slung shot, sword cane, spear, knuckles, etc. *Held*, error. *Tracey v. State*, 496.

6. Article 320 of the Penal Code defines the offense of going into a church, school room or other place where people are assembled for amusement, etc., having a pistol about the person. The persons excepted from the operation of this article by article 321 are peace officers only, and do not include even the owner of the premises in which the people are assembled. A school teacher does not come within the exceptions provided by the said article 321, and is not authorized to carry a pistol about his person in his school room, among his pupils, nor on the occasion of a public assembly in his school room. *Alexander v. State*, 533.

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CARRYING PISTOL—*continued*.

7. That the accused had reasonable ground for fearing an unlawful attack upon his person is not an available defense to a prosecution for a violation of article 320 of the Penal Code. But see the statement of the case for evidence *held* insufficient to support such defense even if available. *Id.*

CARRYING A PISTOL INTO A PUBLIC ASSEMBLY.
See CARRYING PISTOL, 6.

CASES APPROVED.

1. A verdict against joint offenders on a joint trial, to be valid, must assess a separate penalty against each offender. Flynn v. The State, 8 Texas Ct. App., 389, and Matlock et al. v. The State, 25 Id., 716, and Cunningham v. The State, 26 Id., 83, approved. *Medis & Hill v. State*, 194.

2. Boland's case, 11 Texas Ct. App., 159, approved. *Bautsch v. State*, 342.

3. Ormond's case, 24 Texas Ct. App., 496, approved. *Kelley v. State*, 562.

CHANGE OF VENUE.
See VENUE, 2, 3.

CHARGE OF THE COURT.
See MURDER, 25-29. PRINCIPAL OFFENDERS, 1.
PENALTY, 1. THEFT, 28.

1. It is an established rule of practice in this State that, upon the trial of an offense which comprehends different degrees it becomes the imperative duty of the trial court to instruct the jury upon the law applicable to every degree or grade of offense indicated by the evidence, however feeble such evidence may be; that, if there be a doubt as to which of two or more grades of the offense the accused may be guilty, the law as to all of such grades should be charged, and that the trial court should omit to charge the law of any particular grade only when it is to no extent whatever raised by the evidence. See the statement of the case for evidence adduced on the trial for murder, which, though sufficient to establish the express malice essential to constitute murder of the first degree, is not of such character as to absolutely preclude the jury from finding therefrom a killing upon implied malice, and, therefore, murder in the second degree; wherefore the omission of the trial court to instruct the jury upon the law of murder of the second degree was error. *Blocker v. State*, 16.

2. The accused, being on trial for murder, contends that, under the law of this State, it is the duty of the trial judge, in murder cases, without regard to the evidence adduced, to instruct the jury as to the law of murder of the second degree. But *held* that, notwithstanding the apparent plausible construction of the statutes upon which the

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proposition is maintained, the doctrine obtains in this State that the trial court may decline to submit to the jury the issue of murder of the second degree when the evidence wholly fails to present that issue. See the opinion in extenso upon the question, and note the suggestion relative to the charge in trials for murder. *Id.*

3. To charge the jury, in felony cases, upon the law applicable to the case, whether asked or not, is under our law a duty imposed imperatively upon the trial judge. It is an express provision of our statute that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statements under oath, or upon his own confession in open court." The trial being upon the plea of not guilty, and not upon confession in open court, the omission of the trial court to give in charge to the jury the substance of the above statutory provisions was fundamental error. *Wilson v. State*, 47.

4. It is a rule of practice in this State that special instructions, whether given or refused by the trial judge, must be authenticated by his signature, and if the record fails to show that such instructions were refused, the Appellate Court will presume that they were given. *Smith v. State*, 50.

5. Special instructions are properly refused when it appears that to the extent they were correct they were embodied in the general charge. *Id.*

6. Note the approval of Wilson v. The State, *ante*, to the effect that without a supporting affidavit an information is not sufficient evidence of jurisdiction alleged in the indictment, and that the omission of the trial court, on trial for perjury, to give in charge to the jury the substance of article 746 of the Code of Criminal Procedure, is fundamental error. But note that the errors in this respect, committed upon the trial of Wilson's case, were not committed upon the trial of this case. *Id.*

7 Special counsel for the State, in the concluding argument for the prosecution, stated to the jury that "the defense of an insult to a man's wife is set up in two-thirds of the cases in this county;" that, "when before the grand jury the witness Rose made no such statement as that he picked a pistol up from the ground;" that "he knew John Collier well, and that he was an honest and truthful man," and that "John Collier left a wife and a lot of orphan children, and in their behalf you should punish the defendant;" with reference to all of which statements the trial judge instructed the jury that they were not to be considered, as they rested upon no evidence in the case. *Held* that the instruction of the trial court was sufficient to countervail any prejudicial tendency of the said statements. *Miller v. State*, 63.

8. Objection that the trial court charged the jury abstractly upon the issue of manslaughter can not be entertained, inasmuch as it was not interposed when the charge was given, and no probable injury to

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the accused is shown. See the opinion for a charge upon homicide in defense of the person against an unlawful attack, and the statement of the case for a charge upon adequate cause, *held* sufficient, under the facts of the case. And note that the evidence does not call for a charge upon "cooling time," nor upon self defense, wherefore the trial court did not err in omitting to charge upon "cooling time" nor refusing the special charge as to self defense. *Id.*

9. Bill of exception reserved to the charge of the court, if too general or indefinite to point out specific objection, will not be considered on appeal; and, in the absence of a proper bill of exception, this court will examine the charge of the court below only with reference to fundamental errors or such as, under all the circumstances of the case, are calculated to prejudice the rights of the accused. *Peace v. State*, 88.

10. The charge of the court in this case should, more explicitly than it did, have instructed the jury that, to convict, they must find that the defendant was not present at the commission of the murder, and that the murder was committed by a person or persons who had been advised, commanded or encouraged by the defendant to commit it. *Dugger v. State*, 95.

11. If the proof tends to raise the question whether or not a State's witness is an accomplice in the offense on trial, can the trial court, in any state of case, refuse to submit to the jury the question of accomplice *vel non*, together with proper instructions upon the corroboration of accomplice testimony? If so, it must not only be because the proof that the witness is an accomplice is meagre, but because the other proof in the case tends strongly to show that he is not. The proof in this case fairly mooting the complicity of the two State's witnesses, the trial court erred in refusing to instruct the jury upon the law of accomplice testimony. *Hines v. State*, 104.

12. The trial court instructed the jury to convict in case they found that the defendant (within the alleged venue and dates) pursued the occupation of selling spirituous, vinous and malt liquors, in quantities less than a quart, "without having paid the occupation tax of three hundred dollars to the State and one hundred and fifty dollars to the county of Galveston, and the said taxes were then due and owing and unpaid to the State and county respectively;" and further instructed the jury that the penalty was by a fine of not less than four hundred and fifty dollars, nor more than nine hundred dollars. Appellant assails these instructions because they substitute the phrase "without having paid the tax" in lieu of the phrase "without having obtained a license." *Held* that the substitution was to appellant's advantage, and affords him no cause for complaint. *Fahey v. State*, 146.

13. It was also objected that the instructions assumed as a fact that the county of Galveston had levied on the appellant's occupation a county tax of one half the tax levied on it by the State. The record, however, shows that the appellant admitted that fact on the trial, and

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that the State consequently introduced no other proof of it. *Held*, that the objection is not tenable. *Id.*

14. Objection was taken to the penalty as stated in the instructions, viz: a fine of not less than four hundred and fifty dollars nor more than nine hundred dollars. *Held* that the instruction was correct, inasmuch as the State tax was three hundred dollars and the county tax one hundred and fifty dollars, aggregating four hundred and fifty dollars, which was the minimum and the double of which was the maximum of the fine prescribed by the statute. *Id.*

15. The trial court charged the jury as follows: "Penetration is necessary to constitute the offense, but penetration only is necessary to constitute the offense." *Held*, abstractly correct, but insufficient, because, in addition to penetration, it is essential in a rape case to show want of the woman's consent, and that the act was accomplished by force, threats or fraud. *Johnson v. State*, 163.

16. The court charged further as follows: "It is not sufficient, to secure a conviction, for the State to make out a prima facie case, but the guilt of the defendant must be shown beyond a reasonable doubt; and the failure or inability of the defendant to show his innocence does not lend any additional probative force to the incriminative facts, if any, shown by the State, or raise any presumption of guilt against the defendant." This charge, though abstractly correct, was calculated to lead the jury to believe that, in the opinion of the court, the defense had failed to show innocence. A reasonable doubt of guilt, independent of exculpatory proof, entitles an accused to an acquittal *Id.*

17. The court further instructed the jury that "the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and, if upon the whole evidence you have a reasonable doubt of his guilt, you must acquit him, and not resolve the doubt by a mitigation of the punishment." This charge is objectionable in that the concluding clause may have induced the jury to inflict the greater penalty instead of the milder one provided by the statutes. Note the suggestion that in charging the reasonable doubt the trial court should follow the language of the statute. (Penal Code, art. 727.) *Id.*

18. In this case the trial court charged upon an issue depending upon the evidence. The defendant excepted to the charge because it was unwarranted by any evidence in the case. In his authentication of the bill of exceptions, the trial judge recites that there was no such evidence adduced on the trial, and that the evidence referred to in the charge was evidence adduced on the trial of another case. The statement of facts does contain evidence which would warrant the charge, but, as the bill of exceptions controls, the charge must be held erroneous as unauthorized by any evidence on the trial. *Briscoe v. State*, 193.

19. The rule that, in rape cases, requires that, if the other proof in the case tends to raise the issue of the female's consent to the carnal act, she becomes so far an accomplice that, in order to warrant a conviction based upon her testimony, she must be corroborated, applies to

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sodomy cases, and if the evidence tends to show the consent of the prosecuting witness to the act of bestiality committed upon him, he must be corroborated. The proof in this case tends strongly to show the consent of the alleged injured party, who, upon the main issue, was the State's principal witness; and in failing to instruct the jury with regard to the corroboration of an accomplice, the trial court erred. *Medis & Hill v. State*, 194.

20. The act of killing, in this case, necessarily included an assault and battery, and the charge of the court defining murder sufficiently embraced assault and battery, but the trial court, in addition, gave in charge an independent definition of assault and battery. *Held* material error, because excepted to. Moreover, it was matter calculated only to encumber the charge and confuse the jury. *Crook v. State*, 198.

21. A charge of the court in a trial for murder which omits to define the terms "malice" and "malice aforethought"—essential elements of murder—is fundamentally erroneous, and such error is not cured by a definition of "express malice." *Id.*

22. The charge of the court defined express malice to be "where one with a calm, sedate and deliberate mind and formed design kills another," etc. *Held*, erroneous, because it omits to qualify the act as an *unlawful* killing. *Id.*

23. Upon the defense of alibi as applied to the alleged principal, the charge of the court required the jury to believe that the alleged principal was not present at the time and place of the killing. *Held* error, because the effect of such charge was to eliminate from the defense of alibi the doctrine of reasonable doubt. *Id.*

24. While not essential, it was proper that the charge of the court should instruct the jury as to the forms of the verdict they could return in this case. The form of the verdict, in the event of conviction, as prescribed by the charge in this case was as follows: "We, the jury, find the defendant Mack Crook guilty as an accomplice to murder of the first degree in the killing and murdering of James H. Black, as charged in the indictment," etc. *Held*, correct. *Id.*

25. Accomplice to crime is a distinct offense, especially defined by our code, and punished in the same manner as the principal offender. Note that Hurt, Judge, dissents from this ruling, and maintains that being an accomplice to a crime is not a specific offense, and that the accomplice is guilty of the offense committed by the principal. *Id.*

26 In a trial for murder the inculpatory evidence tended to prov- that the defendant and his brother waylaid the deceased, and that he was fired upon and killed by one or both of them—both being present and acting together in perpetrating the homicide. According to the defense, the meeting of the deceased with the defendant and his brother was accidental, and the first shot was fired by the deceased at the defendant's brother, who, in self defense, and with no co-operation of defendant, fired upon and killed the deceased. The trial court gave in charge to the jury the law of murder of the first degree, and of jus-

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tifiable homicide in self defense, but refused to give in charge the law of murder of the second degree and of manslaughter. *Held*, that the charge covered the only issues in the case, and properly omitted the law of murder of the second degree and of manslaughter. *Green v. State*, 244.

27. The minimum punishment for pursuing an occupation taxed by law without having first obtained necessary license, is a fine of not less than the tax imposed upon such occupation. And as the license of a retail liquor dealer can not issue for a shorter period than one year, the minimum punishment for the violation of the said article 110 is a fine in the full amount of one year's tax upon such occupation. The charge of the court so defining the penalty, it was correct. *Davidson v. State*, 262.

28. Failing to request instructions to supply omissions in the charge of the court, the defendant in a misdemeanor case can not be heard to complain of such omissions, notwithstanding he may have excepted to the same. *Id.*

29. The swindling was alleged to have been committed by means of a false written instrument and the false declaration of the accused that the names appearing to the same were genuine signatures. The trial court charged the jury in effect that before they could convict they must find that the signatures were on the instrument when it was delivered by the accused, and that he then falsely and fraudulently declared that they were genuine, and so induced the issuance of the draft. *Held*, that the instruction was correct in principle, and applicable to the chargein the indictment and the facts in evidence. But see the statement of the case for evidence upon which it is *held* that the verdict of guilty is contrary to both the instruction and the proof. *Scott v. State*, 264.

30. On a trial for horse theft the court admitted hearsay evidence of the contemporaneous theft of a saddle, which evidence, on motion of the defense, was stricken out. Thereafter evidence for the State was admitted identifying as the property of one P. a certain saddle found in the possession of the defendant when he was found in possession of the horse, and the court's charge limited the application of such evidence to the identification of the transaction and the intent of the defendant, etc. *Held*, that, in the absence of proof that the saddle was stolen, the evidence was erroneously admitted, and the charge was erroneous because not based upon legal proof. *Neeley v. State*, 315.

31. Rape by force, as defined by article 528 of the Penal Code, is carnal knowledge of a woman, obtained by force, without her consent. "Force," as used in the said article, is such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case (Penal Code, art. 529), and upon a trial for rape by force it devolves upon the trial court to give in charge to the jury such statutory definition of "force." *Brown v. State*, 330.

32. To constitute the offense of assault with intent to rape by force, the offender must have committed an assault or assault and

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battery upon the female with the specific intent to rape by force, and the force thus intended must be such force as might reasonably be supposed to overcome resistance, taking into consideration the relative strength of the parties and the other circumstances in the case; and on a trial for assault with intent to rape by force the trial court must so instruct the jury. But see the opinion of Willson, Judge, dissenting from the ruling of the majority of the court, and holding that, though to constitute the offense of assault with intent to rape by force, the assault must be accompanied by the specific intent to rape by force, the character of the force intended is immaterial, and that it is not the duty of the trial court, upon a trial for assault with intent to rape by force, to give in charge to the jury the definition of "force," as prescribed by article 529 of the Penal Code. *Id.*

33. In its preliminary statement to the jury the charge of the court designates the offense on trial as "false swearing," but subsequently designates it as perjury—the offense charged in the indictment. The verdict was general, and found the defendant "guilty," and assessed his penalty at five years in the penitentiary, the minimum penalty for perjury, and the maximum penalty for false swearing. The judgment of the court on the verdict declares the defendant "guilty of false swearing as found by the jury," but the final judgment and sentence declare that he has been "adjudged guilty of perjury." The State moves this court to reform the judgment and sentence so as to conform them to the verdict, maintaining that, as the verdict is general, it responds to the indictment, which charges perjury. But *held* that though this court, in cases wherein the verdict is certain, will exercise its power to conform the judgment or sentence, or both, thereto, it will not do so in cases wherein, as in this case, there is any uncertainty about the import of the verdict. *O'Bryan v. State*, 339.

34. The charge of the court on the doctrine of reasonable doubt is sufficient if it applies the said doctrine to the whole case. *Thurmond v. State*, 347.

35. See the statement of the case for a charge of the court upon the law applicable to the corroboration of accomplice testimony, *held* sufficient. *Id.*

36. Upon the ground that it was warranted neither by the indictment nor the evidence on the trial, the defense excepted to the charge of the court to the effect that the jury might convict if they believed that Owens killed the deceased, and that defendant was present, and, knowing the unlawful intent of Owens, aided him by act or encouraged him by word or gesture in the commission of the act. *Held* that the legality of such charge can not be made to depend upon a corresponding allegation in the indictment, and that the evidence on the trial fairly raised the issue; wherefore the charge was correct. *Id.*

37. The defense requested the following special instruction: "You are further instructed that, if you believe from the evidence that the witness Owens was testifying to save himself from punishment or moral obliquy of guilt, then his testimony can not be convicted upon, unless

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corroborated as the evidence of an accomplice." *Held* that the court did not err in refusing the instruction. *Id.*

38. It is only under extraordinary or peculiar circumstances that it is proper for the trial court to instruct the jury as to the law governing impeaching testimony, and the failure of the court to do so in this case was not error.

39. Upon the ground that, independent of the confession of the defendant, the State had adduced no proof of the *corpus delicti*, the defense requested the trial court to instruct the jury, in effect, that before they could consider the confession of the defendant as inculpatory evidence, the proof of the *corpus delicti* must be absolute and beyond a reasonable doubt. One of the grounds upon which the court refused the requested instruction was that the State, under the peculiar circumstances of this case, was entitled to have the confession considered by the jury. *Held*, that the ruling, in view of the other proof in the case, and of the general charge as given by the court, was correct. *Willard v. State*, 386.

40. The laws of the Cherokee Nation being in evidence, the trial court instructed the jury that, under said laws, certain acts constituted theft, and left it to the jury to determine from the evidence whether the defendant committed such acts. *Held*, sufficient; and that the court did not err in failing, in its charge to the jury, to define and construe the laws of the said Nation. *Clark v. State*, 405.

41. See the opinion in extenso for a charge of the court upon the question of the possession of recently stolen property, etc., *held* correct and responsive to the proof. *Id.*

42. Omission or refusal of the trial court to submit in charge to the jury the law of murder in the second degree, when the evidence establishes only the higher grade, is not error. *McCoy v. State*, 415.

43. The appellate court, in determining the question whether injury or probable injury resulted to the accused from the giving of an erroneous, or the omission of a necessary, instruction, must consider the charge in its entirety and as applied to the evidence embodied in the statement of facts. *Id.*

44. In this case the general charge of the court clearly and concisely hinged the guilt of the accused upon the question whether he was present when C. killed the deceased, and, knowing the unlawful intent of C., aided or encouraged C. in the killing of the deceased; or whether he advised or agreed to the killing of the deceased by C., and was present when C. killed the deceased. The defense requested an alternative charge based upon the theory that C., unaided in any manner by the accused, shot and killed deceased, and that the shooting of one E., at the same time and place by the accused, was a distinct and separate transaction from the killing of the deceased by C. The trial court gave the requested instruction with the following qualification: "The foregoing charge is given in subordination to the general charge regarding principals." This qualification was not excepted to, but was urged as cause for new trial, and is relied upon in this court

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for reversal, the defense maintaining that, if the evidence does not clearly establish its theory, it leaves it in doubt, and that its said theory should have been submitted to the jury affirmatively, subordinate to no other charge and untrammeled by any qualification whatever. *Held*, that abstractly the objection is sound, and if based upon sufficient evidence or opposed by insufficient inculpatory proof, would require a reversal of the conviction; but, the evidence not only refuting the theory, but establishing beyond peradventure the propositions propounded by the general charge, the qualification appended to the special charge by the trial judge did not inure to the injury of the defendant. *Id.*

45. A defense witness testified that, about a month before the alleged offense, the accused had a difficulty in the Indian Territory with one Phelps; that Phelps made an unsuccessful attempt to obtain a weapon with which to kill the accused, and afterwards told the witness that he, Phelps, was "going to Gainesville and fix himself, and that he and Jim Stilly never could live in the same country," which threat the witness communicated to the accused. Upon this proof the defense requested the following charge: "The law authorizes an individual to carry on his person a pistol, who has a reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. To justify such apprehension, it is not necessary that the danger should in fact exist, or that the person threatening should be present, or in view of the defendant at the time of carrying the pistol, but it is only necessary that the facts and circumstances should be of such a nature as to excite a reasonable apprehension of danger so imminent and threatening as not to admit of the arrest of the party threatening an attack." *Held* that the danger contemplated by the statute was not proved, and the instruction was properly refused. *Stilly v. State*, 445.

46. Charge of the court which omits to instruct the jury that they must expressly find the truth or untruth of a special plea is erroneous. *Wright v. State*, 447.

47. The *factum probandum* of theft is the taking of the property. If that fact is proved merely as a matter of inference from other facts in evidence, and not by an eye witness, the case rests wholly upon circumstantial evidence; and the failure of the trial court to charge the jury upon the law of circumstantial evidence is material error. *Taylor v. State*, 463.

48. Possession of recently stolen property is not positive evidence of theft, but merely a circumstance tending to prove theft, and is therefore in its character simply circumstantial evidence; and, when alone relied upon by the prosecution, demands of the trial court a charge upon the law of circumstantial evidence. *Id.*

49. If the inculpatory facts in a theft case consist alone of recent possession of stolen property, explained by the accused when first challenged, it imposes upon the court the imperative duty of explain-

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ing to the jury in its charge the law applicable to such recent possession and explanation. *Id.*

50. See statement of the case for a special instruction, given in charge to the jury, at the instance of the State, *held* correct. *Williams v. State*, 466.

51. It is the province of the court, in cases involving the construction of the laws of another State or country, to construe such laws, and determine when such laws have been established in evidence. In this case the charge left that question,—involving the laws of New Mexico as to theft,—to the jury, whereas it should have explained to the jury the purport of that law, and instructed them that it had been proved. The error, however, is not reversible error, as it was favorable to the defense. *Id.*

52. The rule has been announced in repeated decisions of this court that the possession of recently stolen property is not of itself proof positive of theft, but that the proof of such possession, "however recent, and whether explained or not, is merely a fact or circumstance to be considered by the jury, in connection with all the other facts submitted to them, in determining the guilt of the possessor." The same rule requires that when the accused, upon being first challenged, offers an explanation of his possession, it devolves upon the court to instruct the jury as to the effect of such explanation;—that is, if the explanation is reasonable, it will prevail as against the naked possession unless rebutted by the State. The presumption of guilt which attends possession of stolen property is a presumption of fact for the jury, and not of law. In this case the charge of the court, otherwise correct, instructed the jury that the "possession of recently stolen property is presumptive evidence of guilt." *Held*, error. *Lee v. State*, 475.

53. There was no contest or dispute as to the ownership of the stolen ticket, which fact was proved as alleged in the indictment. In this state of the case, and in the absence of a requested instruction to supply the omission, the failure of the trial court to instruct the jury that the ownership must be proved as alleged was error without prejudice. *Cunningham v. State*, 479.

54. Exception to a charge of the court based upon an erroneous statement of a principle of law will necessitate the reversal of a conviction without inquiry as to the effect of such error on the jury. In this case the charge misdirected the jury as to the value which determines the grade of theft. Moreover, all of the proof in the case shows that the theft, if theft was committed, was a felonious theft, and the court therefore erred in charging at all on misdemeanor theft—the rule being that the court shall charge only upon issues presented by the evidence. *Id.*

55. If the accused acquired *lawful* possession of the stolen property, he can not be convicted of theft unless it is shown that he obtained such possession by false pretext, or with intent, at the very time he obtained such possession, to deprive the owner of its value, and to appropriate it to his own use, and further, that he did so appropriate it. A charge of the court which authorized conviction upon proof

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that the fraudulent intent was conceived *after* lawful possession was acquired was error. *Id.*

56. The information charged the appellant with carrying a pistol only, and the evidence on the trial related to the carrying of a pistol only; notwithstanding which the trial court charged the jury with reference to the carrying of a dagger, dirk, slung shot, sword cane, spear, knuckles, etc. *Held*, error. *Tracey v. State*, 496.

57. A charge of the court is erroneous which instructs the jury upon a phase of case not raised by the evidence on the trial. *Id.*

58. Charge of the court in a perjury case is fundamentally erroneous if it omits to instruct the jury upon the provisions of article 746 of the Code of Criminal Procedure. *Miller v. State*, 497.

59. The charge of the court defining principals was abstractly correct, but it failed to apply the law to the facts developed on the trial. To supply this omission the defendant requested the court to instruct the jury that, "in order to convict the defendant, they must find from the evidence that the defendant was, as a principal, as hereinbefore defined, concerned in the original taking of the mare; and if they find from the evidence that one Jeff Griffin first took possession of the mare alleged to be stolen, and delivered the same or sold the same, for himself or for one J. J Elkins, to defendant, then they should acquit the defendant although they should believe that the original taking of said animal by Griffin was fraudulent and that defendant knew it was fraudulent." *Held*, that the refusal to give such instruction, under the proof in this case, was error. *Knowles v. State*, 503.

60. In its motion for rehearing, the State contends that the complicity of the defendant in the offense charged is shown by the testimony of the witness W., to the effect that defendant told him that "all the connection Griffin had with the mare was this: that he, defendant, sent said Griffin to get the mare for him and to bring her to him"—the effect of which would be to constitute G., an innocent agent acting by command of the defendant, and the defendant by reason thereof (all other elements of theft existing) the sole principal offender. *Held*, that if said testimony of W imports such a case, then the charge of the court was fatally erroneous in not submitting that phase to the jury; wherefore rehearing is refused. *Id.*

61. Charge of the court instructed the jury as follows: "The intended injury may be bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind. The handling of a woman without her consent, in order to have undue familiarities with her, may produce such emotions without inflicting bodily pain or injury." *Held*, correct. *Henkel v. State*, 510.

62. The trial court instructed the jury as follows: "The defendant is presumed by the law to be innocent until his guilt is established by competent evidence to the satisfaction of the jury, beyond a reasonable doubt; and if you have on your minds arising from the evidence a reasonable doubt as to the guilt of the defendant, you will find him not

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CHARGE OF THE COURT—*continued.*

guilty." *Held*, sufficient on the doctrine of reasonable doubt, and not obnoxious to the objection that it "requires either the State or the defendant to introduce affirmative evidence of the defendant's innocence;" nor to the further objection that it contravenes the rule that a reasonable doubt may as well arise from a want of evidence as from evidence introduced before a jury. *Zwicker v. State*, 589.

63. The defense requested the court to charge the jury in effect that if they believed the defendant was so drunk that he did not realize what he was saying, when he made his confession, such confession should not be considered as evidence against him. *Held*, that the requested instruction was properly refused because it not only rested upon no evidence of drunkenness, but that pretense was refuted by the proof. *Id.*

64. The evidence in this case shows conclusively that the conflict was provoked and brought on by either the defendant or the deceased, and that the other, in resisting the attack, acted upon real or apparent necessity. *Held*, that such proof excludes the idea of mutual combat, and in submitting that issue to the jury the charge of the trial court was erroneous. *Kelley v. State*, 562.

65. See the statement of the case for evidence *held* insufficient to support a conviction for theft, because insufficient to establish a fraudulent taking of the property; and note the same for a requested instruction to the jury, the refusal of which, under the evidence adduced, was error. *Wilson v. State*, 577.

66. See the opinion for a charge of the court upon the law of circumstantial evidence *held* erroneous, and in view of the defendant's exception, cause for reversal. In lieu of the said erroneous charge, the accused asked a special charge on the subject, in the usual form, which the trial court refused. *Held*, error. *Woods v. State*, 586.

67. See the statement of the case for a special charge of the court requested by the defense which, in view of the proof, was erroneously refused. *Id.*

68. On the trial the defense requested the court to instruct the jury as follows: "1. If you believe from the evidence of the witnesses that J. T. White had leased the farm of Watson for the year 1887, that he was for the time owner of said premises, and had the right to use the premises for his own convenience, so that he did not use them to the injury of another, and in the use of the same he had a right to open the fence for his own convenience. 2. Gentlemen, if you believe from the evidence that defendant cut the fence of Watson for his own convenience, and not maliciously for the purpose of injuring Watson, you will acquit. If you have a reasonable doubt as to defendant's guilt you will acquit." *Held*, that, being correct in principle, and embodying issues made by the proof, the refusal of the court to give said instructions was error. *White v. State*, 638.

69. Charge of the court on a trial for perjury is fundamentally erroneous if it fails to instruct the jury that a conviction for perjury can not be had except upon the testimony of at least two credible

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CHARGE OF THE COURT—*continued.*

witnesses, or of one credible witness strongly corroborated by other evidence, or upon the accused's confession in open court, as to the falsity of the statements under oath. *Brookin v. State*, 701.

70. On a trial for theft the trial court charged the jury as follows: "When two or more persons conspire together to commit an offense, and each carries out the part agreed to be done by him, and such offense is actually committed, then all parties to such an agreement are equally guilty of such offense; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant fraudulently took the property charged to have been stolen, as given you in charges Nos. 1 and 2, and that defendant and others agreed or conspired, before or after such taking, to prove a purchase or pretended purchase of said cattle, either before or after such taking, this would be no defense to such fraudulent taking." *Held* that, under the proof on the trial (for which see the statement of the case), the charge was not erroneous. *Kegans v. State*, 703.

71. See the opinion for the substance of proposed testimony for the defense *held*, in view of the other proof in the case, to have been erroneously excluded. *Id.*

72. As a general definition of malice, the trial court instructed the jury as follows: "Malice means a settled purpose or intention to seriously injure or destroy another." *Held*, erroneous. *Cahn v. State*, 709.

73. In view of the evidence, the trial court erred in omitting to instruct the jury that, if defendant provoked the contest with deceased, but not with the intention of killing or doing him serious bodily injury, he would not, by such provocation, be wholly deprived of the right of self defense, but that in such case self defense might be availed of by him to the extent of reducing the degree of homicide to a grade less than murder. *Id.*

74. See the statement of the case for special instructions which, in view of the evidence, were erroneously refused by the trial court. *Id.*

COMMITMENT.

See CONTEMPT OF COURT, 4.

COMPLAINT.

See INFORMATIONS, 2.
VARIANCE, 2.

CONFESSION.

1. The proof on a trial for rape was in direct conflict as to the identity of the defendant as the person who committed the offense. A defense witness having testified to facts tending to establish in favor of the defendant a case of mistaken identity, the State, over objection of defendant, was permitted to interrogate the witness as to whether or not, subsequent to the alleged offense, he received from the defendant a letter confessing his guilt, and making a statement concerning, and asking information about, the commission of the offense. In permitting this man-

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CONFESSION—*continued.*

ner of examination the court erred, because, first, if, as manifest, the purpose of the State was to prove that the witness received from defendant a letter written by him and confessing his guilt, it should first have summoned the witness with a *subpœna duces tecum* to produce the letter in court. Failing then to produce the letter, the witness might be examined to prove the reception by him of such a letter, and that to his knowledge it was written by defendant. But then the contents of the letter could not be proved by the witness without proof of the loss or destruction of the same. Second, if the object of the State was to impeach the witness, then the fact whether or not he had received a letter from the defendant was the only fact about which the predicate was allowable, and, the witness having answered that question in the negative, the limit of the investigation was reached, under the rule that "when a witness is cross examined on a matter collateral to the issue, his answer can not be subsequently contradicted by the party putting the question." This rule was further violated in this case by permitting the State to contradict the witness by another witness, as to the letter. *Johnson v. State*, 163.

2. Under the common law, the confession made by the accused under his agreement to become State's evidence, can be used against him in a prosecution instituted because of his violation of his agreement. But, as heretofore held by this court, such confession, to be admissible, must have been voluntarily and freely made, uninfluenced by persuasion or compulsion; not induced by any promise creating hope of benefit, nor by threats creating fear of punishment. A promise, such as will render the confession inadmissible, must be positive, must be made or sanctioned by a person in authority, and must be of such character as would be likely to influence the party to speak untruthfully. A confession induced by the mere fear of legal punishment is not thereby rendered inadmissible. *Neeley v. State*, 324.

3. The defendant in this case, being at large and not in custody, agreed with the county attorney to testify for the State against his accomplices in this and other thefts, upon the consideration of immunity to himself from prosecution for such offenses. He, however, repudiated the agreement, although, when he entered into it he made a confession which, upon his subsequent trial, was introduced in evidence against him. The proof shows that such confession was not voluntary, and that it was made upon the promise of exemption from prosecution. *Held* that, having violated his agreement to testify for the State, the accused was properly placed upon trial for the offense charged against him, and that the confession, being an involuntary one, was properly excluded upon that ground. *Id.*

4. But the trial court admitted the said confession under the provisions of article 750 of the Code of Criminal Procedure, which legalizes a confession in duress as evidence, if it states facts afterwards found to be true, and which conduce to establish the guilt of the accused. *Held* that, if verified in the manner prescribed by said article

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CONFESSION—*continued.*

750, such confession would be admissible. But in this case there is a total absence of verifying proof; wherefore, the trial court erred in admitting the confession in evidence. *Id.*

5. A naked confession is not sufficient of itself to support a conviction. *Willard v. State*, 386.

6. The defendant requested the court to charge the jury in effect that if they believed the defendant was so drunk that he did not realize what he was saying, when he made his confession, such confession should not be considered as evidence against him. *Held*, that the requested instruction was properly refused, because it not only rested upon no evidence of drunkenness, but that pretense was refuted by the proof. *Zwicker v. State*, 539.

CONSPIRACY.

On a trial for theft, the trial court charged the jury as follows: "When two or more persons conspire together to commit an offense, and each carries out the part agreed to be done by him, and such offense is actually committed, then all parties to such an agreement are equally guilty of such offense; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant fraudulently took the property alleged to have been stolen, as given you in charges Nos. 1 and 2, and that defendant and others agreed or conspired, before or after such taking, to prove a purchase or pretended purchase of said cattle, either before or after such taking, this would be no defense to such fraudulent taking. *Held* that, under the proof on the trial (for which see the statement of the case), the charge was not erroneous. *Kegans v. State*, 703.

CONSTITUTIONAL LAW.

See DISTRICT COURTS.

1. Under the Acts of March 11, 1881, and April 4, 1881, the appellant was prosecuted for pursuing the occupation of selling liquors in quantities less than a quart, without paying the tax required by law and without license, etc. He excepted to the indictment on the ground that the said Acts of 1881 are violative of the Constitution of the State in two respects; first, because they contain more than one subject, and embrace subjects not expressed in their titles; and, second, because, as a condition precedent to engaging in such business, the said Acts require the tax thereon to be paid in advance for the term of a year, but permit the tax on other occupations to be paid quarterly, and require a license to pursue said business, but permit others to be pursued without a license, and therefore are repugnant to the constitutional requirement of equality and uniformity in taxation. But *held* that neither of these objections to the said Acts of 1881 is tenable, nor are the said Acts repugnant to the Fourteenth Amendment of the Constitution of the United States. See the opinion in extenso for a lucid exposition of the principles and precedents which maintain the constitutionality of the said enactments. *Fahey v. State*, 146.

2. The present Constitution of Texas provides that "No bill (except

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CONSTITUTIONAL LAW—*continued.*

general appropriation bills, etc.,) shall contain more than one subject, which shall be expressed in its title." *Held* that an Act may, without contravening this inhibition, contain or contemplate more objects than one. *Id.*

3. Section 1 of article 8 of the State Constitution expressly empowers the Legislature to impose occupation taxes, and section 2 of the same article requires that such taxes shall "be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." These provisions do not necessitate equality and uniformity as between different classes of occupations, nor require the imposition upon every class of the same conditions precedent to their lawful pursuit; and therefore the requirement from retail liquor dealers of a license and of prepayment of the tax for a year does not contravene the said constitutional provisions, though these conditions be not imposed upon other occupations. So, also, one county may, without infringing said provisions, levy a larger county tax upon an occupation than is levied on the same occupation by other counties. *Id.*

4. Article 756 of the Penal Code provides that any person is guilty of an offense who, being engaged in the slaughter and sale of animals for market, shall fail to report to the commissioners court of the county in which he transacts his business, at each regular term thereof, the number, color, age, sex, marks and brands of all animals slaughtered by him, together with a bill of sale, or written conveyance to him for every animal slaughtered by him, save such as were raised by himself, etc. Article 754 of the Penal Code provides that any person is guilty of an offense who, being engaged in the slaughter of animals, shall kill or cause to be killed any unmarked or unbranded animal for market, or shall purchase and kill or cause to be killed, any animal without having taken a bill of sale or written transfer of the same from the person selling the same. To a prosecution under article 756, the defendant pleaded the unconstitutionality of the said article upon the ground that to require him to make such report would be to require him to give evidence that could be used against him in a prosecution under article 754; wherefore the said article 756 is in contravention of section 10 of the Bill of Rights. *Held*, that the defense is untenable, and that the said article 756 is constitutional. *Aston v. State*, 574.

CONTEMPT OF COURT—CIVIL AND CRIMINAL.

1. Criminal contempt of court consists in the doing of an act in disrespect of the court or its process, or which obstructs the administration of justice, or tends to bring the court into disrepute; and such contempt, if committed in a justice of the peace's court, may be punished by the justice of the peace by fine not exceeding twenty-five dollars, and imprisonment not exceeding one day. Civil contempt of court consists in failure or refusal to perform an act ordered by the court for the benefit of another party. *Ex Parte Robertson*, 628.

2. The relator, who is constable of precinct number three, of Travis

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CONTEMPT OF COURT—CIVIL AND CRIMINAL—*continued.*

county, was charged with the execution of a writ of sequestration sued out of the justice's court. Failing to execute the same, he was proceeded against in the said justice's court by the plaintiff in the writ. Acting under article 4539 of the Revised Statutes, the justice of the peace adjudged the relator guilty of contempt of his court, fined him in the sum of thirty-nine dollars and nineteen cents, to inure to the plaintiff in the writ of sequestration, and committed him to jail until payment of said fine and costs. *Held* that the failure and refusal of the relator to execute the writ of sequestration constituted civil contempt of the said justice's court, and that the justice exercised his legal authority in so adjudging him guilty, and in imposing the said fine and committing him pending payment thereof. *Id.*

3. A fine imposed for contempt is not "debt" within the meaning of section 18 of the Bill of Rights, which provides that "no person shall ever be imprisoned for debt." *Id.*

4. Judgment and the commitment in this case are both void because they omit the essential recital that it was within the power of the relator, as constable, to execute the writ; and the commitment is void for the further reason that, upon its face, it commits the relator on a fine imposed for criminal contempt. Wherefore the relator is discharged without day. *Id.*

CONTINUANCE.

1. The statute under which one of plural defendants, whether jointly or separately indicted, by filing his affidavit to the effect that he verily believes there is no evidence against his co-defendant, and that the testimony of his co-defendant is material to his own defense, may require that his co-defendant be first tried, can not, independent of other sufficient showing, be held to operate a continuance of his case to secure the testimony of his co-defendant. When arraigned in the district court of Shackelford county, to which the venue had been changed from Stephens county, the defendant in this case filed an affidavit setting forth that Jane Stouard was charged by separate indictment with the same offense; that the indictment against Jane Stouard was still pending in the district court of Stephens county; that the testimony of the said Jane Stouard was material to his defense, and that he verily believed there was not sufficient evidence to convict the said Jane Stouard; upon which affidavit he prayed the court to order that the said Jane Stouard be first tried, and that his trial be continued in order to enable him to secure the testimony of said Jane Stouard, if acquitted. *Held*, that the court did not err in refusing to continue the case to await the trial of the co-defendant. *Stouard v. State*, 1.

2. The application for continuance recited also the absence of two material witnesses. Overruling the same for the want of diligence, the trial judge explained that, although confined in the same jail with one of the absent witnesses for months, the accused had

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CONTINUANCE—*continued.*

taken no steps to secure the service of process upon him; and that, although, as shown by a previous application for continuance, the defendant knew that the other witness was an incurable invalid, and unlikely ever to be able to leave his bed, he had taken no steps to secure his deposition. *Held* that the ruling was correct. *Id.*

3. Even if the absent testimony set out in an application for continuance be both admissible and probably true, it will not, if immaterial, require the award of a new trialbecause of the refusal of the continuance. *Peace v. State*, 83.

4. The application for continuance failing to show the exercise of legal diligence to secure the absent testimony, and the said absent testimony, viewed in the light of the proof on the trial, appearing not to be probably true, the refusal of the continuance could not constitute cause for new trial. *Wilks v. State*, 381.

5. Refusal of continuance will not be revised unless presented by proper bill of exception. *Powers v. State*, 700.

"COOLING TIME."

See CHARGE OF THE COURT, 7.
EVIDENCE, 8.

CORPUS DELICTI.

1. The criminal act and the defendant's agency in producing the act are issues which the State must prove in order to warrant a conviction for crime. But such issues may be established by circumstantial as well as direct evidence, and the legal test of its sufficiency is whether it satisfies the understanding and conscience of the jury beyond a reasonable doubt. *Willard v. State*, 386.

2. A naked confession is not sufficient of itself to support a conviction. *Id.*

3. Upon the ground that, independent of the confession of the defendant, the State had adduced no proof of the *corpus delicti*, the defense requested the trial court to instruct the jury, in effect, that before they could consider the confession of the defendant as inculpatory evidence, the proof of the *corpus delicti* must be absolute and beyond a reasonable doubt. One of the grounds upon which the court refused the requested instruction was that the State, under the peculiar circumstances of this case, was entitled to have the confession considered by the jury. *Held*, that the ruling, in view of the other proof in the case, and of the general charge as given by the court, was correct. *Id.*

CORROBORATION.

See ACCOMPLICE TESTIMONY, 1.
CHARGE OF THE COURT, 35

"CRAPS."

See EXHIBITING GAMING TABLE, 2.

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CREDIBLE WITNESS.
See DEFINITIONS, 1.

CROSS EXAMINATION OF WITNESSES.

1. Proof on a trial for rape was in direct conflict as to the identity of the defendant as the person who committed the offense. A defense witness having testified to facts tending to establish in favor of defendant a case of mistaken identity, the State, over objection of defendant, was permitted to interrogate the witness as to whether or not, subsequent to the alleged offense, he received from the defendant a letter confessing his guilt, and making a statement concerning, and asking information about, the commission of the offense. In permitting this manner of examination the court erred, because: First, if, as manifest, the purpose of the State was to prove that the witness received from defendant a letter written by him and confessing his guilt, it should first have summoned the witness with a *subpœna duces tecum* to produce the letter in court; failing then to produce the letter, the witness might be examined to prove the reception by him of such a letter, and that to his knowledge it was written by defendant; but then the contents of the letter could not be proved by the witness without proof of the loss or destruction of the same. Second, if the object of the State was to impeach the witness, then the fact whether or not he had received a letter from the defendant was the only fact about which the predicate was allowable, and, the witness having answered that question in the negative, the limit of the investigation was reached, under the rule that, "when a witness is cross examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question." This rule was further violated in this case by permitting the State to contradict the witness, by another witness, as to the letter. *Johnson v. State*, 163.

2. A witness can not avoid answering a question that is material to the issue, upon the ground that it imputes disgrace to himself, unless such disgrace amounts to crimination. Under this rule the trial court did not err in refusing to permit the defense, upon cross examination, to ask a State's witness if he did not, upon the trial of one W., for rape, endeavor to get the defendant to procure false testimony against W., such proposed evidence being material to no issue in this case. *McCoy v. State*, 415.

COUNTY JUDGE.

A county judge is an officer authorized to take affidavits in the body of his county. *O'Bryan v. State*, 339.

D

DECLARATIONS.
See EVIDENCE, 16.
PRACTICE, 33.

DEFINITIONS.
See CARRYING PISTOL, 2.
CONTEMPT OF COURT, 1.
EXTORTION, 1.
NEGLIGENCE.

1. A "credible witness," as used in the statute, means "one who,

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DEFINITIONS—*continued.*

being competent to give evidence, is worthy of belief." *Wilson v. State*, 47.

2. This prosecution was for removing mortgaged property out of the State, as that offense is defined by article 797 of the Penal Code. In the stead of the statutory word "remove," the indictment uses the word "run." *Held*, that the words are equivalent as the word "remove" is used in the statute. See the statement of the case for the charging part of an indictment *held* sufficient to charge the offense of removing mortgaged property out of the State. *Williams v. State*, 258.

3. "Any unlawful act done wilfully and purposely to the injury of another is as against that person malicious; this wrong motive, when it is shown to exist, coupled with a wrongful act, wilfully done to the injury of another, constitutes legal malice." *Dempsey v. State*, 269.

4. Not only must the proof show that the alleged malicious prosecution was actuated by legal malice, but it must show a want of probable cause for instituting the alleged malicious prosecution. By probable cause is meant the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted. Under this rule a prosecution, although instituted with legal malice, would not be a penal offense if probable cause existed to believe the offense charged was committed by the party prosecuted. See the opinion on the question; and note that in this case though legal malice existed, probable cause also existed. *Id.*

5. "Writing" or "written," as those terms are used in the statutes of this State, include "printing" or "printed"; and it is not a valid objection to an indictment that it is partly written and partly printed. *O'Bryan v. State*, 339.

6. "Wilful," in legal parlance, means with evil intent, with legal malice, without legal justification, and with no reasonable ground to believe the act legal. *Moore v. State*, 439.

7. "Living together," though not defined by the code, means within the purview of the statute defining adultery, that the parties "dwell or reside together; abide together in the same habitation as a common or joint residing place." The conviction in this case is for adultery committed by the first mode, but the evidence, failing to show that the parties *lived together*, although it proves habitual intercourse, is insufficient to support the conviction. *Bird v. State*, 635

DILIGENCE.

See CONTINUANCE, 4.
EVIDENCE, 47.
MURDER, 17.

1. The application for continuance recited also the absence of two material witnesses. Overruling the same for the want of diligence, the trial judge explained that, although confined in the same jail with one of the absent witnesses for months, the accused had taken no steps to

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DILIGENCE—*continued.*

secure the service of process upon him; and that although, as shown by a previous application for continuance, the defendant knew that the other witness was an incurable invalid, and unlikely ever to be able to leave his bed, he had taken no steps to secure his deposition. *Held*, that the ruling was correct. *Stouard v. State*, 1.

2. In order to warrant the conviction of an overseer of a public road for failure, neglect or refusal to perform the duties of his office, it devolves upon the State to show that such failure, neglect or refusal on his part was wilful—that is, with evil intent, with legal malice, without legal justification, and with no reasonable ground to believe his action legal. Such overseer is charged only with reasonable diligence and effort in the discharge of his duty, and can not be held criminally responsible for failing to keep his road in repair, when it is shown that to do so with the means available to him is an impossibility. If he exercised reasonable diligence and effort, no wilful failure, neglect or refusal to discharge his duty can be imputed to him. *Moore v. State*, 489.

DISTINCT AND CONTINUOUS OFFENSES.

To bet at any game played with dice, by whatever name the game be known, is an offense under the law of this State. And each separate act of betting at such a game constitutes a distinct offense. The consecutive throwing of dice from nightfall until day break does not constitute a continuous game, and the consecutive betting on the different throws does not constitute a continuous offense. *Day v. State*, 143.

DISTRICT AND COUNTY ATTORNEY.

The county attorney of each county in a judicial district, except the county in which the district attorney resides, is expressly required by law to attend the terms of the county and other inferior courts of his county, and therein to represent the State in all criminal cases under prosecution or examination. The district attorney is not required to aid or assist the county attorney in such prosecutions, and the mere fact that a prosecution carried on by the county attorney may eventuate in the return of an indictment to the district court which may ultimately be prosecuted by the district attorney, will not make such district attorney counsel in the case before the return of the indictment. In this case the examining trial of the accused was prosecuted by a county attorney prior to the election of the Hon. Rufus Hardy to the district judgeship, and while he occupied the office of district attorney. The indictment was found subsequent to his election to the district judgeship, and was presented at a term of court over which he presided. The record further shows that the district judge, while district attorney, had no connection whatever with the prosecution of the examining trial. *Held* that the objection to the qualification of the judge was properly overruled. *Wilks v. State*, 381.

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DISTRICT COURTS.

The relator was convicted of a felony at a term of the district court of Karnes county which, under the law of 1885, began on the eighth day of April, 1889. Seeking by habeas corpus toavoid the execution of the sentence then pronounced against him, he shows that, by the act of April 2, 1889, to which an emergency clause was appended, the time of the holding of the terms of the said district court was changed to the fourth Monday in March:—his contention being that, by reason of the said enactment of April 2, 1889, he was tried and convicted at a time when a legal term of the said district court could not be held. *Held* that, notwithstanding the emergency clause appended to the act of April 2, 1889, the said act did not operate to invalidate the term of the court which began on April 8. The said act is constitutional, but, the emergency clause to the contrary notwithstanding, it did not take effect until such time as would not deprive any county in the judicial district of its constitutional right to two terms per annum of the district court. *Ex Parte Murphy*, 492.

DISTRICT JUDGE.

A judge is disqualified to preside at the trial of a criminal case wherein he has been of counsel either for the State or the accused. *Wilks v. State*, 381.

DISQUALIFICATION.

See DISTRICT JUDGE.
JURY LAW, 3-5.

DYING DECLARATIONS.

1 As a necessary predicate for the admission in evidence of dying declarations, it must be established that the declarant, when he made them, was under the sense of impending death, and was sane. Consciousness of approaching death is provable, not merely by the solemn protestations of the dying person, but by any circumstance which sufficiently shows that when he made the declarations he was under the sense of impending death. See the opinion and the statement of the case for evidence *held* sufficient to establish the necessary predicate for the proof of dying declarations. *Miller v. State*, 63.

2. See evidence held sufficient to establish the requisite predicate for the admission of dying declarations. *Cahn v. State*, 709.

E

EQUALITY AND UNIFORMITY OF OCCUPATION TAX.

Section 1 of article 8 of the State Constitution expressly empowers empowers the Legislature to impose occupation taxes, and section 2 of the same article requires that such taxes shall "be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." These provisions do not necessitate equality and uniformity as between different classes of occupations, nor require the

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EQUALITY AND UNIFORMITY OF OCCUPATION TAX—*continued.*

imposition upon every class of the same conditions precedent to their lawful pursuit, and therefore the requirement from retail liquor dealers of a license and of prepayment of the tax for a year does not contravene the said constitutional provisions, though these conditions be not imposed upon other occupations. So, also, one county may, without infringing said provisions, levy a larger county tax upon an occupation than is levied on the same occupation by other counties. *Fahey v. State*, 146.

EVIDENCE.

See CHARGE OF THE COURT, 3, 64.

CONFESSIONS, 6.

THEFT, 6.

1. To support a conviction for offering adulterated food for sale it devolves upon the State to prove not only that the accused offered such food for sale, but that, when he did so, he knew that the said food was adulterated. See the statement of the case for evidence *held* insufficient to support a conviction for offering adulterated food for sale. *Sanchez v. State*, 14.

2. It is essential in a perjury case not only that the indictment shall allege that the court before which the judicial proceeding in which the perjury is charged to have been committed had jurisdiction of such judicial proceeding, but that fact must be established by the proof. *Wilson v. State*, 47.

3. Under the law of this State, an information is insufficient for any purpose unless founded upon a complaint, filed therewith, charging an offense. The indictment in this case charged that the perjury was committed on the trial of a judicial proceeding in the county court "wherein one Bean was duly and legally charged by information," etc. To support the allegation of jurisdiction of the county court, the State introduced in evidence the information, but not the complaint. *Held*, that the proof was insufficient. *Id.*

4. As a necessary predicate for the admission in evidence of dying declarations, it must be established that the declarant, when he made them, was under the sense of impending death, and was sane. Consciousness of approaching death is provable, not merely by the solemn protestations of the dying person, but by any circumstance which sufficiently shows that when he made the declarations he was under the sense of impending death. See the opinion and the statement of the case for evidence *held* sufficient to establish the necessary predicate for the proof of dying declarations. *Miller v. State*, 63.

5. The defendant having introduced evidence of threats against his life, uttered by the deceased, a short time before the homicide, the State, over defendant's objection, was permitted to prove that, about a year before the homicide, the defendant told a witness that the "threats of John Collier (deceased) did not amount to any more than those of an old woman." *Held* that objection to this proof was properly overruled. *Id.*

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6. Objection that the trial court charged the jury abstractly upon the issue of manslaughter can not be entertained, inasmuch as it was not interposed when the charge was given, and no probable injury to the accused is shown. See the opinion for a charge upon homicide in defense of the person against an unlawful attack, and the statement of the case for a charge upon adequate cause, *held* sufficient, under the facts of the case. And note that the evidence does not call for a charge upon "cooling time," nor upon self defense, wherefore the trial court did not err in omitting to charge upon "cooling time" nor refusing the special charge as to self defense. *Id.*

7. See the statement of the case for evidence *held* sufficient to support a conviction for murder of the second degree. *Id.*

8. Bill of exception to the admission of evidence must disclose the ground of objection; otherwise it is not entitled to be considered on appeal. *Hughes v. State*, 127.

9. The husband or wife is competent to testify for the other in a criminal prosecution, but not for the State, unless the prosecution be for an offense committed by the one against the other. This rule is not relaxed by a mere separation of the spouses without a legal severance of the marriage relation. *Johnson v. State*, 135.

10. Ownership, like every other material issue on a trial for theft, must be proved by competent evidence, and if it rests upon the testimony of an accomplice such proof is insufficient unless legally corroborated. *Hanson v. State*, 140.

11. See the statement of the case for the substance of evidence *held* insufficient to support a conviction for theft. *Id.*

12. A witness, to be incompetent to testify in behalf of a defendant upon the ground that he was under indictment for the same offense, must appear to have been indicted for participation in the very same criminal act for which the defendant is being tried. It will not suffice to disqualify him that he is indicted for a similar offense. The defense in this case offered a witness by whom to prove an alibi. The witness was rejected, upon the State's motion, upon the ground that he was charged by a separate indictment with the same offense. The onus of establishing incompetency by showing that the indictment against the witness covered the same criminal act for which the defendant was on trial rested on the State; and, the State failing to establish that fact in this case, the presumption obtained in favor of the competency of the witness, and the ruling of the court was error. *Day v. State*, 143.

13. In order to authorize the conviction of an accused, as an accomplice, it devolves upon the State to establish the guilt of the principal of the offense charged against him; and, to establish that specific issue (but not that the accused is an accomplice), any evidence is admissible that would be competent against the principal if on trial. Under this rule the trial court did not err in admitting proof of the confession of the principal; and, in limiting the purpose of such proof to the issue of the principal's guilt, the charge of the court was correct. *Crook v. State*, 198.

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14 The State's witness Holman testified on the trial of the accused as an accomplice to murder, to the acts, declarations and statements of one Harris, and to a conversation between him, the witness, the said Harris, and the alleged principal, to all of which the accused objected upon the ground that he was not present at any of the times testified about, and that it had not been shown that a conspiracy to commit murder existed between him and the said parties. *Held* that this proof in this case was clearly hearsay, and was inadmissible except upon the predicate of the existence of such a conspiracy. Whether the proof sufficiently established the predicate was, primarily, a question to be determined by the court; but, the evidence clearly presenting the sufficiency of the predicate as an issue in the case, the trial court erred in failing to submit that issue to the jury, with instructions to disregard the evidence admitted unless the predicate was established by other proof. In the same connection the court should have instructed the jury that a conspiracy can not be established by the acts or declarations of a co-conspirator, made after the consummation of the offense and in the absence of the defendant. See the opinion for a special charge on the subject, which, being correct and demanded by the proof, was erroneously refused. *Id.*

15. Expressions of the trial judge, in the presence of the jury, with reference to the cogency of the evidence, if prejudicial to the defendant, and exception is promptly reserved, constitute cause for reversal. Pending the discussion in the presence of the jury, of the admissibility in evidence of the declarations of an alleged co-conspirator, the trial judge interjected questions to counsel which clearly intimated that, in his opinion, a conspiracy had been sufficiently established to admit the evidence; to which action of the judge the defendant promptly excepted. *Held*, material error. The jury should have been retired pending the discussion and the ruling on the question. *Id.*

16. A prosecuting witness having testified to certain inculpatory facts, the defense sought to impeach him by proving that he had made statements contradictory of his testimony on the trial. Thereupon, over objection by the defense, the State was permitted to introduce evidence in support of the good general reputation of the witness for truth and veracity. *Held*, that the action of the court was correct, especially in view of the showing that the impugned witness was a stranger in the county of the trial. *Id.*

17. As a predicate for the introduction in evidence of the written testimony of one T., as delivered at the examining trial, it was proved that the said T. resided in the Indian Territory at the time of the examining trial and at the time of this trial. *Held* that the predicate was sufficiently established. *Id.*

18. The defense offered to prove by the witness N. the statement made to him by an one D. to the effect that the gun with which it was claimed by the State the killing was done was found by D. at a certain place, which proof, upon objection by the State, was excluded as hearsay. *Held* that the ruling was correct. *Id.*

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19. The swindling was alleged to have been committed by means of a false written instrument and the false declaration of the accused that the names appearing to the same were genuine signatures. The trial court charged the jury in effect that before they could convict they must find that the signatures were on the instrument when it was delivered by the accused, and that he then falsely and fraudulently declared that they were genuine, and so induced the issuance of the draft. *Held*, that the instruction was correct in principle, and applicable to the charge in the indictment and the facts in evidence. But see the statement of the case for evidence upon which it is *held* that the verdict of guilty is contrary to both the instruction and the proof. *Scott v. State*, 264.

20. To authorize a conviction for malicious prosecution, the proof must show that the prosecution alleged to be malicious was actuated by malice. *Dempsey v. State*, 269.

21. "Any unlawful act done wilfully and purposely to the injury of another is as against that person malicious; this wrong motive, when it is shown to exist, coupled with a wrongful act, wilfully done to the injury of another, constitutes legal malice." *Id.*

22. Not only must the proof show that the alleged malicious prosecution was actuated by legal malice, but it must show a want of probable cause for instituting the alleged malicious prosecution. By probable cause is meant the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted. Under this rule a prosecution, although instituted with legal malice, would not be a penal offense if probable cause existed to believe the offense charged was committed by the party prosecuted. See the opinion on the question; and note that in this case, though legal malice existed, probable cause also existed. *Id.*

23. On the trial, the court below permitted the justice of the peace before whom the alleged malicious prosecution was had to testify that he discharged the alleged injured party, because, in his opinion, the evidence did not support the charge brought against him. *Held*, error. *Id.*

24. The wife of the deceased, who had been previously tried for complicity in the same offense, and had been acquitted, testified for the defense on this trial, and, to impeach her testimony, the State was permitted to prove contradictory statements previously made by her. The objection urged to this by the defense was that she was under arrest at the time she made the said contradictory statements, and that the evidence was hearsay. *Held*, that the objection was properly overruled. Articles 749 and 750 of the Code of Criminal Procedure, excluding confessions made in duress, apply only to the confessions or admissions of *a defendant who is on trial*, made when under arrest, and they can not be extended to parties not on trial. Whilst hearsay, so far as the defendant was concerned, the said contradictory statements were admissible to impeach the witness, to

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which sole purpose they were properly limited by the charge of the court. *Hawkins v. State*, 273.

25. In support of the motion for new trial, the defense filed the affidavit of a third person to the effect that after the trial of Sarah Washington, for the same offense, and before the trial of the defendant, one of the jurors who tried the defendant, said that the said Sarah Washington should have been awarded the death penalty, and that the testimony on her trial and that on the trial of defendant was essentially the same. The counter affidavit of the impugned juror affirms that he had no recollection of making the statement imputed to him, and that, if he made it, he made it in jest, and that he tried the defendant without bias or prejudice, and solely upon the evidence adduced and the law given in charge. *Held*, that the motion for new trial was properly overruled. *Id.*

26. See the statement of the case for evidence *held*, although circumstantial, to be sufficient to support a capital conviction for murder. *Id.*

27 See the statement of the case for evidence objected to by a defendant on trial for murder, *held*, in view of the other proof in the case, to have been properly admitted; and note that the evidence as a whole is held amply sufficient to support a conviction for murder in the second degree. *Moody v. State*, 287.

28. Whether or not the table on which the game was exhibited was made specifically for gaming purposes can not, ordinarily, affect the issue in a prosecution for exhibiting or keeping a gaming table for the purpose of gaming, it being "rather from the character of the playing, or the game which is played, that it (the table) receives its specific designation." Another test is that it is any table on which any game is played "which in common language is said to be played, dealt, kept or exhibited." The characteristics of a gaming table or bank, as correctly declared in Stearnes's case, 21 Texas, 693, are: "1. It is a game. 2. It has a keeper, dealer or exhibitor. 3. It is based on the principle of the one against the many—the keeper, dealer or exhibitor against the betters, directly or indirectly. 4. It must be exhibited for the purpose of obtaining betters." *Chappell v. State*, 310.

29. This indictment charges that the appellant * * * "did unlawfully keep for the purpose of gaming a gaming table used for gaming, to wit: for playing a game with dice, commonly called "craps.'" It was proved on the trial that "craps is played by one man taking two dice in his hand and throwing them on the table; and the man who throws bets on seven or eleven to win, and the other party bets against him. First one and then another will throw the dice. The game can be played on any flat surface." The same witness testified that he did not know that the accused had any interest in the saloon in which the game was played or in the table on which it was played; that he only knew "the defendant held the bets and received five cents for each two throws that were thrown." *Held*, that the proof does not support the allegation in the indict-

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ment. The table was in no way essential to the game, which could have been played on any flat surface; the game included no keeper or exhibitor, and was played only by the parties who participated in the throwing of the dice. *Id.*

30. On a trial for horse theft the court admitted hearsay evidence of the contemporaneous theft of a saddle, which evidence, on motion of the defense, was stricken out. Thereafter evidence for the State was admitted identifying as the property of one P. a certain saddle found in the possession of the defendant when he was found in possession of the horse, and the court's charge limited the application of such evidence to the identification of the transaction and the intent of the defendant, etc. *Held*, that, in the absence of proof that the saddle was stolen, the evidence was erroneously admitted, and the charge was erroneous because not based upon legal proof. *Neeley v. State*, 315.

31. The State introduced a witness who testified to a confession made by the accused, and subsequently introduced witnesses to support the reputation for truth and veracity of the witness by whom the confession was proved. Those witnesses testified that for several years preceding the removal of the said witness (about eighteen months before the trial) they lived in the same neighborhood with him. The defense objected that this evidence did not establish the necessary predicate for the supporting testimony. But *held* that the predicate was sufficient. *Thurmand v. State*, 347.

32. It is only under extraordinary or peculiar circumstances that it is proper for the trial court to instruct the jury as to the law governing impeaching testimony, and the failureof the court to do so in this case was not error. *Id.*

33. A witness for the defense testified that he saw the killing; that one Owens and not defendant shot and killed the deceased, and that the defendant was not present at the time of the killing. The State produced several witnesses who testified that the reputation of the said defense witness for truth and veracity was infamous. To support the credibility of its said witness, the defense offered to prove that he testified to the same facts on previous trials involving the same subject matter. *Held* that the rejection of the said proposed proof was correct. *Id.*

34. An assault and a specific intent to murder are two elements which must concur in order to constitute the offense of assault with intent to murder. The intent must be established as an inference of fact to the satisfaction of the jury, but the jury may draw that inference, as they draw all others, from any fact in evidence which to their minds fairly proves its existence. *Trevinio v. State*, 372.

35. If the assault is voluntary, is committed with deliberate design, and with an instrument capable of producing death, and there are no extenuating circumstances, it is an assault with intent to murder. And "whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with

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that intent." See the statement of the case for evidence *held* sufficient to support a conviction for assault with intent to murder. *Id.*

36. The criminal act and the defendant's agency in producing the act are issues which the State must prove in order to warrant a conviction for crime. But such issues may be established by circumstantial as well as direct evidence, and the legal test of its sufficiency is whether it satisfies the understanding and conscience of the jury beyond a reasonable doubt. *Willard v. State*, 386.

37. A naked confession is not sufficient of itself to support a conviction. *Id.*

38. Upon the ground that, independent of the confession of the defendant, the State had adduced no proof of the *corpus delicti*, the defense requested the trial court to instruct the jury, in effect, that before they could consider the confession of the defendant as inculpatory evidence, the proof of the *corpus delicti* must be absolute and beyond a reasonable doubt. One of the grounds upon which the court refused the requested instruction was that the State, under the peculiar circumstances of this case, was entitled to have the confession considered by the jury. *Held*, that the ruling, in view of the other proof in the case, and of the general charge as given by the court, was correct. *Id.*

39. See statement of the case on this and the former appeal (26 Texas Ct. App., 126), for evidence *held* sufficient to support a conviction for cattle theft. *Id.*

40. This was a prosecution for theft—the indictment charging the theft of three horses in the Cherokee Nation and the bringing of the same into this State. The contention of the defense was that, inasmuch as under an act of the Congress of the United States a white man can not be prosecuted to conviction and punished for a theft committed in the Indian Territory except in the United States courts, he can not be prosecuted to conviction in this State for the theft of property in the Indian Territory, as theft is defined by the law of said Territory, and the bringing of the same into this State; that, as no act can constitute an offense unless a penalty for the commission thereof is provided, and as, under the act of Congress, a white man is not amenable to the law of the Indian Territory for theft, he can not within the purview of that law commit theft, it follows that he can not be prosecuted in this State under articles 798 and 799 of the Penal Code, and therefore the trial court erred in admitting in evidence the statute of the Cherokee Nation defining theft of live stock. *Held*, that the defense can not be maintained. The rule is that if a person commits in another State or Territory acts which, if committed in this State, would be theft, and the said acts constitute theft under the laws of the said State or Territory, and he subsequently brings the stolen property into this State, he can be prosecuted in this State and punished as if the theft had been committed in this State. The statute of the Cherokee Nation, admitted in evidence over objection, excepts no race nor class from its operation

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and clearly defines the offense of theft with penalty annexed, and it was properly admitted in evidence. *Clark v. State*, 405.

41. A State's witness was permitted to testify that, about two or three weeks before the homicide, the defendant, in the presence of the witness and others, said that if the deceased ever came to Twohig he had better come shooting or he would not leave there alive. The objection urged was that the evidence did not tend to show the complicity of the defendant as a principal actor in the homicide, nor to establish a conspiracy with C., who was the actual perpetrator, to kill the deceased. *Held*, that the proof showing defendant to have been present at the homicide, the evidence was properly admitted in corroboration of attending circumstances evidencing not only a conspiracy to murder the deceased, but that the defendant and C. acted in concert in the perpetration of the murder. *McCoy v State*. 415.

42. A witness can not avoid answering a question that is material to the issue, upon the ground that it imputes disgrace to himself, unless such disgrace amounts to crimination. Under this rule the trial court did not err in refusing to permit the defense, upon cross examination, to ask a State's witness if he did not, upon the trial of one W., for rape, endeavor to get the defendant to procure false testimony against W., such proposed evidence being material to no issue in this case. *Id.*

43. The motion for rehearing shows to the satisfaction of this court that, by reason of a clerical error in a bill of exceptions, the origina opinion states that the witness E. testified that the threats of the deceased were to be executed at Cotulla, whereas in fact the said witness testified that Twohig was the place whereat, in the event of the deceased going there, the threats would be executed. But *held* that, notwithstanding this showing, the motion for rehearing must be denied, because, in the light of the evidence on the trial, the absent testimony, if adduced, could nothave affected the result of the trial. *Id.*

44. Allegation in an indictment for murder that the deceased was killed by a shot fired from a gun will admit proof that the fatal shot was fired from any kind of a fire arm. But in this case the indictment alleged that the deceased was shot and killed by the defendant "with a weapon to the grand jurors unknown." To prove the diligence of the grand jury to ascertain the character of the weapon used, the State asked the foreman of the grand jury: "What effort, if any, did you make to learn the manner and cause of the death of deceased, and what conclusion did you arrive at?" The witness replied as follows. "We had a great many witnesses before the grand jury, and we returned this indictment, which we thought was right." *Held* that the question was erroneously allowed, because upon the question of diligence it was too broad and comprehensive, and was calculated to and did elicit an answer at once incompetent and prejudicial to the rights of the defendant. *Monk v. State*, 450.

45. The indictment having alleged that the deceased came to his death by being shot, it devolved upon the State to establish that fact

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by competent evidence. See the opinion for evidence admitted on the issue *held* incompetent because in part hearsay, and in part the opinion of a witness based upon investigation to which the defendant was not a party. *Id.*

46. See the statement of the case for evidence *held* insufficient to support a conviction for murder in the second degree. *Id.*

47. The indictment charged the murder of one C. Spears. The State proved that subsequent to the disappearance and alleged murder of Spears the defendant collected from one A. a sum of money due by A. to one *Pierce*. *Held*, that in view of proof showing the said Pierce and the said Spears to be one and the same person, the evidence was properly admitted. *Jump v. State*, 459.

48. The sheriff of Dallas county was permitted, over objection by defendant, to testify that, subsequent to the alleged murder, he arrested Monk, a party charged by separate indictment with the same offense, in a distant county. *Held*, error, because even if the evidence were sufficient to establish a conspiracy between defendant and Monk, the proof related to matters transpiring after the consummation of the conspiracy. *Id.*

49. See the opinion for the substance of evidence *held* insufficient to support a conviction for aggravated assault and battery because insufficient to support the ground of aggravation alleged in either of the counts of the indictment. *Stevens v. State*, 461.

50. The application for continuance shows that the defendant sued out as many as four subpœnas and one attachment for the absent witness, who was a resident of Dallas county, and alleged that by the absent witness he would prove that the alleged injured party was the aggressor, and that he struck said party only in defense. The testimony of the prosecuting witness was not only contradicted as to material matter by the witnesses for the defense, but they testified that the prosecuting witness cursed the defendant, and struck him before defendant struck the prosecuting witness, and that, when the defendant finally struck the two blows inflicted upon the prosecuting witness, he, defendant was retreating. *Held* that the diligence being sufficient, and the absent testimony being, in view of the proof, both material and probably true, a new trial should have been awarded. *Id.*

51. The *factum probandum* of theft is the taking of the property. If that fact is proved merely as a matter of inference from other facts in evidence, and not by an eye witness, the case rests wholly upon circumstantial evidence; and the failure of the trial court to charge the jury upon the law of circumstantial evidence is material error. *Taylor v. State*, 463.

52. Possession of recently stolen property is not positive evidence of theft, but merely a circumstance tending to prove theft, and is therefore in its character simply circumstantial evidence; and, when alone relied upon by the prosecution, demands of the trial court a charge upon the law of circumstantial evidence. *Id.*

53. If the inculpatory facts in a theft case consist alone of recent

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possession of stolen property, explained by the accused when first challenged, it imposes upon the court the imperative duty of explaining to the jury in its charge the law applicable to such recent possession and explanation. *Id.*

54. Over the objection of the defendant the State was permitted to introduce in evidence a bill of sale, conveying the alleged stolen horses to the defendant, which bill of sale was found in and taken from the possession of the defendant after his arrest. *Held*, that said bill of sale was properly admitted, in view of the proof showing that it was fabricated by the defendant. It was no objection to said evidence that it was taken from the defendant after his arrest and without authority of law. *Williams v. State*, 466.

55. As a standard of comparison whereby to identify the hand writing in the bill of sale as that of the defendant, the State was permitted to introduce in evidence the authenticated signatures of the defendant to application for continuance, etc., in this case. *Held* correct. *Id.*

56. Inasmuch as an accessory, whose principal is in arrest, can not be tried and convicted until after the trial and conviction of the arrested principal, it devolves upon the State, in the trial of the accessory, to show the conviction of the principal. And to make such proof in this case, the court properly permitted the State to introduce in evidence the verdict and judgment of conviction rendered against the principal. *West v. State*, 472.

57. The indictment charged the defendant with the theft in Dallas county, Texas, of a "coupon railroad ticket, which said ticket entitled the holder thereof to one first class passage from Caldwell in Burleson county, Texas, to New York City by way of Purcell, Kansas City, Quincy, Chicago and Buffalo," the said ticket being the property of the Gulf, Colorado & Santa Fe Railway, and of the value of fifty-seven dollars. The State's witness Cade testified that the value of the ticket, as representing and good for the fare over the said line from Caldwell to New York, was fifty-seven dollars, and that as representing the fare from Dallas to New York, deducting the fare from Caldwell to Dallas, it was fifty two dollars. The State's witness Hirsch testified that the ticket, as representing the price of a first class fare from Dallas to New York, was worth in Dallas the sum of fifty-five dollars; to all of which testimony the defense objected that the market value of the said ticket in Dallas was the one question at issue. But *held* that, in view of Hirsch's further testimony that he paid the defendant twenty-five dollars for the ticket, the admission of the evidence, if erroneous, constituted immaterial and harmless error. *Cunningham v. State*, 479.

58. The defense offered in evidence a letter addressed by the general passenger agent of the Gulf, Colorado & Santa Fe Railway to the conductors on the lines of the said railway, notifying them of the theft of the said ticket, and directing them to take up the same if offered for fare, cancel the same and return it to the office of the writer.

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Held, that the letter being relevant to no issue in the case, was properly excluded. *Id.*

59. An information for slander by imputing to a female a want of chastity should allege, at least in substance, the language actually used by the accused, and to that language the proof should be confined. If the meaning of the language as charged be obscure, then the information should allege its meaning; otherwise proof of its meaning is not admissible. The meaning of the language charged by the information in this case is clear and unambiguous, but the language proved is not only variant from that alleged, but is obscure in meaning. The trial court permitted a State's witness to testify that he understood the language used by the accused to correspond in meaning with that charged in the information. *Held*, error. See the opinion for the substance of evidence *held* insufficient to support a conviction for slander because it does not support the allegations in the information. *Berry v. State*, 483.

60. If the words "any article whatever," as used in article 470, could when said article is construed in connection with article 471, be held to include an inferior quality of merchandise of the same kind as that with which the vessel or package is apparently filled, then, before a conviction could be had, it would devolve upon the State to prove that the accused, with respect to said vessel or package, acted with a guilty knowledge. *Lidtke v. State*, 500.

61. The aggravation alleged in the information was that the accused is an adult male and the injured party a female, and such allegati on imposed upon the State the onus of proving that the accused was an *adult* male—a male person who had attained the full age of twenty-one years. But in a case of this character the proof need not show *in ipsissimis verbis* that the defendant was an adult. *Sufficient* that he is proved to have been a "man" and a "railroad hand," and that it was not controverted that he was an adult. *Henkel v. State*, 510.

62. Over the objections of the defendant, the State was permitted to introduce in evidence a prior indictment against the defendant for demanding, as county judge, fees not allowed by law. *Held*, that the evidence was properly admitted as tending to show a knowledge on the part of the defendant that the fees demanded by him were not lawful,—to which purpose the said evidence was expressly limited by the charge. *Brackenridge v. State*, 513.

63. Article 3415 of the Revised Statutes provides that "no officer shall be prosecuted or removed from office for any act he may have committed prior to his election to office." The proof shows that the defendant was elected and qualified as county judge of Travis county in 1886. That he was re elected on the sixth day of November, 1888; that the offense was committed on the fifteenth day of November, 1888, and that he did not qualify under his re-election until the twenty-first day of November, 1888. It is contended that, under this proof, the defendant is protected from removal by the said section 3415, because he had not *qualified* as his own successor as county judge at the time of

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the alleged offense. But *held* that the position is not maintainable; the defendant, at the time of the offense, was county judge *de facto* and *de jure*, and by virtue of his election and qualification in 1886 was exercising the functions of his office, and had the legal right to exercise them until his successor should qualify; wherefore his official acts on the fifteenth day of November, 1888, came within the purview of article 3388 of the Revised Statutes, and not of article 3415. *Id.*

64. Two of the articles taken from the burglarized house are described in the indictment as a "Canadian quarter of a dollar coin and a Mexican quarter of a dollar coin." Two such coins were produced in evidence by the State, and the court admitted the testimony of an officer that they looked like coins he got from unknown parties after the arrest of defendant; that he did not know from whom he got them, and that he did not get them, nor coins like them, from defendant. *Held* that this evidence in no way traced the said coins to the possession of defendant, and was erroneously admitted. *Mann v. State*, 580.

65. The record in this case failing to show that the venue of the offense was proved as alleged, the conviction must be set aside. *Woods v. State*, 586.

66 See the opinion for a charge of the court upon the law of circumstantial evidence *held* erroneous, and in view of the defendant's exception, cause for reversal. In lieu of the said erroneous charge, the accused asked a special charge on the subject, in the usual form, which the trial court refused. *Held*, error. *Id.*

67. See the statement of the case for a special charge of the court requested by the defense which, in view of the proof, was erroneously refused. *Id.*

68. The information charges that the accused, on March 5, 1888, did play a game of cards in a certain out house, "said out house being then and there a place where people did then and there resort." To authorize a conviction under this information it was necessary for the State to show by the evidence that the offense was committed prior to the presentation of the information, and that at the very time it was committed the said out house was a place where people resorted. See the opinion for the substance of evidence *held* insufficient to support a conviction for playing cards in a place of public resort. *Lynn v. State*, 590.

69. Indictment for robbery having unnecessarily described the money of which the accused robbed the injured party as "lawful money of the United States of America," it was essential to the validity of the conviction that the kind of money be proved as alleged. The proof in this case, falling short of this requirement, does not support the conviction, and the accused should have been awarded a new trial. *Coffelt v. State*, 608.

70. The indictment alleges that the accused *took* the money from the person of F. The proof shows that the accused and another presented pistols at F., and demanded the money, and that F., in fear of his life or of serious bodily harm, and after being struck, delivered the money.

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EVIDENCE—*continued.*

The defense contends that this proof shows a delivery of the money by F. through fear, and, therefore, that there is a fatal variance between the allegation and the proof. But *held* that such a delivery is a *taking* within the purview of the statute defining robbery, and therefore there is no variance. *Id.*

71. See the statement of the case for evidence *held* to have been improperly admitted because hearsay; and for evidence *held* insufficient to support a conviction for aggravated assault because it shows that the violence inflicted by the defendant was justified in resisting an illegal arrest. *Massie v. State*, 617.

72. See the statement of the case for charges of the court on circumstantial evidence and upon the possession of recently stolen property *held* erroneous, and see the same for evidence *held* insufficient to support a conviction for theft. *Hannah v. State*, 623.

73. See evidence improperly admitted, because hearsay. *Nuckolls v. State*, 690.

74. When previously arraigned for trial for cattle theft, the accused applied, under oath, for a continuance for want of two absent witnesses, whose absence, he averred in his application, was not by his procurement or consent,—and this averment in the said application is the perjury assigned in this case. On this trial it was proved that several days before the case for cattle theft was called, the defendant told the said witnesses that he would not need them on his trial; that they need not attend, and they were excused by him from attending that trial in his behalf. To meet this evidence the defendant offered to prove by the witness B. that, after he had excused the said witnesses, and before the theft case was called for trial, he directed the said B. to countermand his agreement excusing them from attending and testifying in his behalf on the trial, and to require them to be present as witnesses in his behalf; that, being himself confined in jail, he could not attend to the matter himself, and B. promised but failed to do as directed by him. This proof was excluded upon objection of the State. *Held*, error, inasmuch as it tended to show, and, if true, did show, a false statement under oath made by mistake. *Brookin v. State*, 701.

75. Charge of the court on a trial for perjury is fundamentally erroneous if it fails to instruct the jury that a conviction for perjury can not be had except upon the testimony of at least two credible witnesses, or of one credible witness strongly corroborated by other evidence, or upon the accused's confession in open court, as to the falsity of the statements under oath. *Id.*

76. A State's witness testified that he arrested the defendant on the day of the shooting and near where it occurred, but was unable to state what length of time had elapsed since the shooting occurred. The defense, on cross examination, proposed to prove by the witness the statement made to him by defendant, when arrested, about the shooting. The proposed proof was excluded as no part of the res gestæ. *Held*, correct. *Cahn v. State*, 709.

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EVIDENCE—*continued.*

77. The testimony of the defense tends to show that about the time of the fatal shooting the defendant claimed that the deceased was indebted to him a sum of money. It also shows that the employment of the defendant as the business manager, bookkeeper and confidential agent of the deceased terminated in June, 1887. In rebuttal of the defendant's claim of money due him by the deceased, the State introduced in evidence, over objection of defendant, a promissory note executed by the deceased in favor of the defendant, dated June 2, 1887, which showed by defendant's indorsement to have been paid, and also a receipt, executed on the same day by the defendant, acknowledging the payment in full by deceased of all claims then due. *Held*, that the trial court did not err in admitting the said note and receipt in evidence. *Id.*

78. During the progress of the trial the defendant's counsel requested permission of the court to consult a State's witness with reference to the testimony he would give in the case. The court granted the request, but the witness refused to disclose his testimony to the counsel, and the latter moved the court to compel the witness so to do. The court refused the motion, and the defendant excepted. *Held*, that the ruling was not error. *Id.*

E

EXEMPTION.

See CARRYING PISTOL, 1, 2, 6, 7.

1. "A person traveling" is a person exempt from the operation of the statute defining the offense of unlawfully carrying a pistol. It is shown in this case that the defendant, with his family in a wagon, left his home in the Indian Territory to go to B., in Cooke county, Texas, via G. in the same county; that he arrived at G. after night and stopped at a wagon yard, where he left his wagon and family, to go into town for the declared purpose of hiring a conveyance to continue his journey that night, but that he was arrested in a gambling room on that night with a pistol on his person. *Held*, that while en route from the Indian Territory, and while in the wagon yard in G., and while on the streets of G. to procure a conveyance, or for any other lawful purpose connected with his journey, he was "a person traveling" within the meaning of the statutory exception, but such exception can not be held to protect him while frequenting the gambling room. *Stilly v. State*, 445.

2. When the State has established against the accused a *prima facie* case of guilt, it devolves upon the accused to establish the facts upon which he relies to excuse or justify the forbidden act. *Id.*

3. A defense witness testified that, about a month before the alleged offense, the accused had a difficulty in the Indian Territory with one Phelps; that Phelps made an unsuccessful attempt to obtain a weapon with which to kill the accused, and afterwards told the witness that he, Phelps, was "going to Gainesville and fix himself, and that he and Jim Stilly never could live in the same country,"

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EXEMPTION—*continued.*

which threat the witness communicated to the accused. Upon this proof the defense requested the following charge: "The law authorizes an individual to carry on his person a pistol, who has a reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. To justify such apprehension, it is not necessary that the danger should in fact exist, or that the person threatening should be present, or in view of the defendant at the time of carrying the pistol, but it is only necessary that the facts and circumstances should be of such a nature as to excite a reasonable apprehension of danger so imminent and threatening as not to admit of the arrest of the party threatening an attack." *Held* that the danger contemplated by the statute was not proved, and the instruction was properly refused. *Id.*

EXHIBITING GAMING TABLE.

1. Whether or not the table on which the game was exhibited was made specifically for gaming purposes can not, ordinarily, affect the issue in a prosecution for exhibiting or keeping a gaming table for the purpose of gaming, it being "rather from the character of the playing, or the game which is played, that it (the table) receives its specific designation." Another test is that it is any table on which any game is played "which in common language is said to be played, dealt, kept or exhibited." The characteristics of a gaming table or bank, as correctly declared in Stearnes's case, 21 Texas, 693, are: "1. It is a game. 2. It has a keeper, dealer or exhibitor. 3. It is based on the principle of the one against the many—the keeper, dealer or exhibitor against the betters, directly or indirectly. 4. It must be exhibited for the purpose of obtaining betters." *Chappell v. State*, 310.

2. This indictment charges that the appellant * * * "did unlawfully keep for the purpose of gaming a gaming table used for gaming, to wit: for playing a game with dice, commonly called "craps.'" It was proved on the trial that "craps is played by one man taking two dice in his hand and throwing them on the table; and the man who throws bets on seven or eleven to win, and the other party bets against him. First one and then another will throw the dice. The game can be played on any flat surface." The same witness testified that he did not know that the accused had any interest in the saloon in which the game was played or in the table on which it was played; that he only knew "the defendant held the bets and received five cents for each two throws that were thrown." *Held*, that the proof does not support the allegation in the indictment. The table was in no way essential to the game, which could have been played on any flat surface; the game included no keeper or exhibitor, and was played only by the parties who participated in the throwing of the dice. *Id.*

EXPRESS MALICE.

See CHARGE OF THE COURT, 21, 2

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EXTORTION.

In legal parlance, and as used in article 240 of the Penal Code, defining extortion, the word "demand" means "a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting." One of the duties of a county judge is to present to the county commissioners his certified account for the fees allowed him by law in criminal cases, and the presentation of such an account by a county judge to the county commissioners, with the request that they approve the said account as a claim against the county, constitutes a "demand" within the meaning of the law. Among the fees which the county judge is entitled to demand and receive from the county is the sum of three dollars for each criminal action "*tried* and finally disposed of" before him. A criminal action *dismissed* is not a criminal action "*tried* and finally disposed of," and if the certified account presented by a county judge to the county commissioners includes a fee for a criminal action merely dismissed, the presentation of such an account amounts to a "demand" for fees not allowed by law. See the opinion *in extenso* for indictment *held* sufficient to charge the offense of extortion as defined by article 240 of the Penal Code. *Brackenridge v. State*, 513.

EXTRA TERRITORIAL OFFENSES.

1. This was a prosecution for theft—the indictment charging the theft of three horses in the Cherokee Nation and the bringing of the same into this State. The contention of the defense was that, inasmuch as under an act of the Congress of the United States a white man can not be prosecuted to conviction and punished for a theft committed in the Indian Territory except in the United States courts, he can not be prosecuted to conviction in this State for the theft of property in the Indian Territory, as theft is defined by the law of said Territory, and the bringing of the same into this State; that, as no act can constitute an offense unless a penalty for the commission thereof is provided, and as, under the act of Congress, a white man is not amenable to the law of the Indian Territory for theft, he can not within the purview of that law commit theft, it follows that he can not be prosecuted in this State under articles 798 and 799 of the Penal Code, and therefore the trial court erred in admitting in evidence the statute of the Cherokee Nation defining theft of live stock. *Held*, that the defense can not be maintained. The rule is that if a person commits in another State or Territory acts which, if committed in this State, would be theft, and the said acts constitute theft under the laws of the said State or Territory, and he subsequently brings the stolen property into this State, he can be prosecuted in this State and punished as if the theft had been committed in this State. The statute of the Cherokee Nation, admitted in evidence over objection, excepts no race nor class from its operation and clearly defines the offense of theft with penalty annexed, and it was properly admitted in evidence. *Clark v. State*, 405.

2. The laws of the Cherokee Nation being in evidence, the trial court instructed the jury that, under said laws, certain acts constituted theft, and left it to the jury to determine from the evidence whether

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EXTRA TERRITORIAL OFFENSES—*continued.*

the defendant committed such acts. *Held*, sufficient; and that the court did not err in failing, in its charge to the jury, to define and construe the laws of the said Nation. *Id.*

F

FACT CASES.

1. See the statement of the case for evidence *held* insufficient to support a conviction for murder of the second degree because it rests upon the testimony of an insufficiently corroborated accomplice. *Stouard v. State*, 1.

2 To support a conviction for offering adulterated food for sale it devolves upon the State to prove not only that the accused offered such food for sale, but that, when he did so, he knew that the said food was adulterated. See the statement of the case for evidence *held* insufficient to support a conviction for offering adulterated food for sale. *Sanchez v. State*, 14.

3. Evidence insufficient to support a conviction for theft. *Reveal v. State*, 57.

4. Evidence sufficient to support a conviction for murder of the second degree. *Miller v. State*, 63.

5. Evidence sufficient to support a conviction for murder of the first degree. *Peace v. State*, 83.

6. See the statement of the case for evidence *held* insufficient to support a conviction as an accomplice to murder. *Dugger v. State*, 95.

7. See the statement of the case in this, and in the case of ex parte Smith and Hughes, 26 Texas Court of Appeals, 134, for evidence *held* sufficient to support a conviction of murder of the first degree. *Hughes v. State*, 127.

8. Evidence *held* insufficient to support a conviction for assault and battery. *Franklin v. State*, 136.

9. Evidence insufficient to support a conviction for theft. *Hanson v. State*, 140.

10. Negligence by omission consists in the omission to perform an act with the performance of which the party is especially charged, and there can be no criminal negligence in the omission to perform an act which it is not the express duty of the party to perform. Under this rule brakemen on a railway train, whose duty is shown to pertain in no degree to the operation of a locomotive, nor to the watching of the railway track, nor the sounding of the danger signal, can not be held liable for the killing of a person by the locomotive, operated by the engineer and fireman, upon whom the duty of operating it exclusively devolved. See the statement of the case for evidence *held* insufficient to support a conviction for negligent homicide. *Anderson et al. v. State*, 177.

11. Evidence insufficient to support a conviction for theft. *McGowan v. State*, 183.

12. A husband has the right to defend himself against an assault committed upon him by his wife, and, unless he employs greater force

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FACT CASES—*continued.*

than is necessary to repel the violence of his wife, he can not be held guilty of an assault and battery. See the opinion for the substance of evidence *held* insufficient to support a conviction for aggravated assault and battery by a husband on his wife. *Leonard v. State*, 186

13. Evidence insufficient to support a conviction for theft. *Castillo v. State*, 188.

14. Evidence insufficient to support a conviction for theft. *Ellis v. State*, 190.

15. A conviction based upon the uncorroborated testimony of an accomplice can not stand. See the statement of the case for the substance of evidence *held* insufficient to support a conviction for hog theft. *Smith v. State*, 196.

16. See the statement of the case for evidence *held* sufficient to support a conviction for the fraudulent removal of mortgaged property. *Williams v. State*, 258.

17. Evidence sufficient to support a capital conviction for murder. *Hawkins v. State*, 273.

18. See the statement of the case for evidence objected to by a defendant on trial for murder, *held*, in view of the other proof in the case, to have been properly admitted; and note that the evidence as a whole is held amply sufficient to support a conviction for murder in the second degree. *Moody v. State*, 287.

19. Evidence sufficient to support a conviction for assault to murder. *Trevinio v. State*, 372.

20. Evidence sufficient to support a conviction for assault to murder. *Wilks v. State*, 381.

21. See the statement of the case on this and the former appeal (26 Texas Ct. App., 126) for evidence *held* sufficient to support a conviction for cattle theft. *Willard v. State*, 386.

22. Evidence held sufficient to support a conviction for assault to murder. *Wood v. State*, 393.

23. Evidence sufficient to support a capital conviction for murder. *McCoy v. State*, 415.

24. Evidence insufficient to support a conviction for murder. *Monk v. State*, 450.

25. See the opinion for the substance of evidence *held* insufficient to support a conviction for aggravated assault and battery because insufficient to support the ground of aggravation alleged in either of the counts of the indictment. *Stevens v. State*, 461.

26. Evidence sufficient to support a conviction for theft. *Williams v. State*, 466.

27. See the statement of the case in Williams v. The State, ante, 466, for evidence *held* sufficient to support the conviction of an accused charged as an accessory to theft. *West v. State*, 472.

28. See the statement of the case for evidence *held* insufficient to support a judgment refusing bail—murder being the offense charged against the relator. *Ex Parte Duncan*, 485.

29. The indictment in this case charged the appellant as a principal

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FACT CASES—*continued.*

in the theft of a mare, but the evidence wholly fails to connect him in any manner with the original taking of the said mare. *Held*, that such proof is insufficient to support a conviction for theft. *Knowles v. State*, 503.

30. Evidence insufficient to support a conviction for theft. *Green v. State*, 570.

31. Evidence insufficient to support a conviction for theft. *Stone v. State*, 576.

32. Evidence insufficient to support a conviction for theft. *Wilson v. State*, 577.

33. Evidence insufficient to support a conviction for playing cards. *Lynn v. State*, 590.

34. The relators were charged jointly by indictment with the murder of J. D. Munn, in Navarro county, Texas, on the sixth day of November, 1888. They sued out jointly a writ of habeas corpus for allowance of bail. Upon the hearing of the writ bail was awarded the relator John Hanson in the sum of three thousand dollars, and was denied to the relator George Hanson. This appeal is jointly prosecuted by the relator John Hanson to secure reduction of the bail allowed below, and George Hanson for an allowance of bail. Upon the evidence adduced on the hearing (for the substance of which, see the statement of the case), the judgment is affirmed as to John Hanson, and reversed as to George Hanson with an award of bail in the sum of five thousand dollars. *Ex Parte Hanson*, 591.

35. Evidence insufficient to inculpate a witness as accomplice to theft. *Kiley v. State*, 606.

36. See the statement of the case for evidence *held* to have been improperly admitted because hearsay; and for evidence *held* insufficient to support a conviction for aggravated assault because it shows that the violence inflicted by the defendant was justified in resisting an illegal arrest. *Massie v. State*, 617.

37. Evidence insufficient to support a conviction for assault. *Bawcom v. State*, 620.

38. Evidence insufficient to support a conviction for theft. *Hannah v. State*, 623.

39. "Living together," though not defined by the code, means within the purview of the statute defining adultery, that the parties "dwell or reside together; abide together in the same habitation as a common or joint residing place." The conviction in this case is for adultery committed by the first mode, but the evidence, failing to show that the parties *lived together*, although it proves habitual intercourse, is insufficient to support the conviction. *Bird v. State*, 635.

40. Evidence sufficient to support a conviction for murder in second degree. *McDade v. State*, 641.

41. Evidence insufficient to support a conviction for attempting to pass a forged instrument. *Leeper v. State*, 694.

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FAILURE TO MAKE REPORT, ETC.

Article 756 of the Penal Code provides that any person is guilty of an offense who, being engaged in the slaughter and sale of animals for market, shall fail to report to the commissioners court of the county in which he transacts his business, at each regular term thereof, the number, color, age, sex, marks and brands of all animals slaughtered by him, together with a bill of sale, or written conveyance to him for every animal slaughtered by him save such as were raised by himself, etc. Article 754 of the Penal Code provides that any person is guilty of an offense who, being engaged in the slaughter of animals, shall kill or cause to be killed any unmarked or unbranded animal for market, or shall purchase and kill or cause to be killed, any animal without having taken a bill of sale or written transfer of the same from the person selling the same. To a prosecution under article 756, the defendant pleaded the unconstitutionality of the said article upon the ground that to require him to make such report would be to require him to give evidence that could be used against him in a prosecution under article 754; wherefore the said article 756 is in contravention of section 10 of the Bill of Rights. *Held*, that the defense is untenable, and that the said article 756 is constitutional. *Aston v. State*, 574.

FALSE PACKING.

1. Article 470 of the Penal Code denounces as guilty of a criminal offense any person who with intent to defraud shall put into any vessel or package containing merchandise or other commodity usually sold by weight, *any article whatever* of less value than the merchandise with which said vessel or package is apparently filled, or any person who, with intent to defraud, shall sell or barter, or give in payment, or expose to sale, or ship for exportation, any such vessel or package of merchandise or other commodity with any such article of inferior *value* concealed therein. Article 471 of the Penal Code denounces as guilty of a criminal offense any person who shall, with intent to deceive and defraud, conceal within any vessel or package containing merchandise or other commodity, any merchandise or commodity of a *quality* inferior to that with which such vessel or package is apparently filled, or any substance of less value, etc. The distinction between the two offenses, construed in connection with each other, is that, whereas the latter offense may be committed by concealing in the vessel or package either like merchandise of inferior quality or any substance of less value, the former offense can be committed only by putting into the vessel or package a substance different in character and of less value than that with which the vessel or package is apparently filled; and whereas, it is an offense under article 470 to fraudulently offer for sale the falsely packed vessel or package, the offering for sale under the latter article is not an offense. The indictment in this case is formulated under article 470, and charges the *sale* of four bales of cotton falsely packed with cotton of inferior quality to that with which they were appar-

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FALSE PACKING—*continued.*

ently filled. *Held*, that the indictment charges no offense against the law. *Lidtke v. State*. 500.

2. If the words "any article whatever," as used in article 470, could when said article is construed in connection with article 471, be held to include an inferior quality of merchandise of the same kind as that with which the vessel or package is apparently filled, then, before a conviction could be had, it would devolve upon the State to prove that the accused, with respect to said vessel or package, acted with a guilty knowledge. *Id.*

FALSE SWEARING.

The affidavit of a public free school teacher to the voucher for his salary is "required by law," and therefore, if false, is matter assignable for perjury, and not for the distinct offense of false swearing. *O'Bryan v. State*, 339.

"FORCE."

1. Rape by force, as defined by article 528 of the Penal Code, is carnal knowledge of a woman, obtained by force, without her consent. "Force," as used in the said article, is such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case (Penal Code, art. 529), and upon a trial for rape by force it devolves upon the trial court to give in charge to the jury such statutory definition of "force." *Brown v. State*, 330.

2 To constitute the offense of assault with intent to rape by force, the offender must have committed an assault or assault and battery upon the female with the specific intent to rape by force, and the force thus intended must be such force as might reasonably be supposed to overcome resistance, taking into consideration the relative strength of the parties and the other circumstances in the case; and on a trial for assault with intent to rape by force the trial court must so instruct the jury. But see the opinion of Willson, Judge, dissenting from the ruling of the majority of the court, and holding that, though to constitute the offense of assault with intent to rape by force, the assault must be accompanied by the specific intent to rape by force, the character of the force intended is immaterial, and that it is not the duty of the trial court, upon a trial for assault with intent to rape by force, to give in charge to the jury the definition of "force," as prescribed by article 529 of the Penal Code. *Id.*

FORGERY.

If the written instrument declared upon as a forgery is so incomplete in form as not to import a legal liability, then, to sufficiently charge forgery upon it, the indictment must allege such facts as will invest it with legal force and show that, if genuine, it would create a legal liability. See the opinion for an indictment *held* insufficient to charge forgery because, in the absence of innuendo averments, the indictment declared upon is incomplete in form and substance, and does not import a legal liability. *King v. State*, 567.

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FORMER ACQUITTAL OR CONVICTION.

See SPECIAL PLEA, 1.

The Code of Procedure, article 553, provides that a former acquittal or conviction in a court of competent jurisdiction bars a further prosecution for the same offense, "but shall not bar a prosecution for any higher grade of offense, over which the said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense." This was a prosecution by information in the county court for aggravated assault. The appellant pleaded in bar his former conviction in the justice's court, which appears to have been a prosecution and conviction under a complaint, and not by information, for simple assault. *Held*, that the plea was properly stricken out. *Henkel v. State*, 510.

FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.

1. Indictment to charge the fraudulent sale or disposition of mortgaged property must allege the name of the person to whom the same was sold or disposed of, or, if such be the fact, that the name of such person was to the grand jurors unknown. *Alexander v. State*, 94.

2. Indictment, to be sufficient to charge the offense of fraudulently disposing of mortgaged property, with intent to defraud, etc., must allege the name of the person to whom the mortgaged property was disposed or sold, or that the name of such person was to the grand jury unknown. *Armstrong v. State*, 462.

FRAUDULENT REMOVAL OF MORTGAGED PROPERTY.

1. This prosecution was for removing mortgaged property out of the State, as that offense is defined by article 797 of the Penal Code. In the stead of the statutory word "remove," the indictment uses the word "run." *Held*, that the words are equivalent as the word "remove" is used in the statute. See the statement of the case for the charging part of an indictment *held* sufficient to charge the offense of removing mortgaged property out of the State. *Williams v. State*, 258.

2. Article 205 of the Code of Criminal Procedure provides that "prosecutions for offenses committed wholly or in part without, and made punishable by law within, this State, may be commenced and carried on in any county in which the offender is found." The mortgage in this case was executed in K. county, where the defendant had possession of the property. He removed the property from said county, and, while en route to Louisiana, was arrested in H. county. Escaping thence, he went into Louisiana with the property. The contention of the defendant is that H., and not K., county, was the county of the venue. But, *held*, that the offense on trial being one that comes within the purview of article 205 of the Code Criminal Procedure, it was properly prosecuted in K. county. *Id.*

3. See the statement of the case for evidence *held* sufficient to support a conviction for the fraudulent removal of mortgaged property. *Id.*

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G

GAMING.

See EXHIBITING GAMING TABLE.

1. It is not essential to the sufficiency of an indictment to charge the offense of betting at a game played with dice, that it shall allege that the accused played the game with another or bet with another person. *Day v. State*, 143.

2. To bet at any game played with dice, by whatever name the game be known, is an offense under the law of this State. And each separate act of betting at such a game constitutes a distinct offense. The consecutive throwing of dice from nightfall until day break does not constitute a continuous game, and the consecutive betting on the different throws does not constitute a continuous offense. *Id.*

3. A witness, to be incompetent to testify in behalf of a defendant upon the ground that he was under indictment for the same offense, must appear to have been indicted for participation in the very same criminal act for which the defendant is being tried. It will not suffice to disqualify him that he is indicted for a similar offense. The defense in this case offered a witness by whom to prove an alibi. The witness was rejected, upon the State's motion, upon the ground that he was charged by a separate indictment with the same offense. The onus of establishing incompetency by showing that the indictment against the witness covered the same criminal act for which the defendant was on trial rested on the State; and, the State failing to establish that fact in this case, the presumption obtained in favor of the competency of the witness, and the ruling of the court was error. *Id.*

GRAND JURY.

The defendant's motion to set aside the indictment was based upon the statutory ground that a person not authorized by law was present when the grand jury deliberated and voted upon the accusation against him. It appears by thedefendant's bill of exceptions that the grand jury for the term was duly organized on December 3, and that it was discharged for the term on December 13; that soon afterward the court took a recess, and, upon reconvening after the recess, ordered the sheriff to reassemble the sixteen persons selected originally by the jury commissioners at the June term to serve at the said December term, viz., the twelve who had been impaneled and the four who had not. Of the sixteen thus summoned, the twelve who had, and one W., who had not, been impaneled reassembled, when one of the said twelve was excused by the court, and the said W. was placed upon the panel in his stead. The contention of the defense is that the trial court had no power to excuse the grand juror after he had been duly impaneled; that the status of the excused person as a legal grand juror was not affected by the action of the court, and that the legal effect of impaneling the substituted juror, W., was to create an unconstitutional grand jury of thirteen persons; and that the presence in the grand jury room of the said W. was the presence of "a person not authorized by law." *Held*, that the motion to set aside the indictment was properly overruled, and that the action

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GRAND JURY—*continued.*

of the court was correct, as conforming to article 391, of the Code of Criminal Procedure, which provides as follows: "When a grand jury has been discharged by the court for the term, it may be reassembled by the court at any time during the term, and in case of failure of one or more of the members to reassemble, the court may complete the panel by impaneling other qualified persons in their stead, in accordance with the rules prescribed in this chapter for completing the grand jury in the first instance." *Trevinio v. State*, 372.

H

HABEAS CORPUS.

1. See the statement of the case for evidence *held* insufficient to support a judgment refusing bail,—murder being the offense charged against the relator. *Ex Parte Duncan*, 485.

2. In construing statutory enactments the courts must so interpret the legislative intent as to harmonize the provisions of the act with the Constitution, if it can be reasonably done. *Ex Parte Murphy*, 492.

3. The relator was convicted of a felony at a term of the district court of Karnes county which, under the law of 1885, began on the eighth day of April, 1889. Seeking by habeas corpus toavoid the execution of the sentence then pronounced against him, he shows that, by the act of April 2, 1889, to which an emergency clause was appended, the time of the holding of the terms of the said district court was changed to the fourth Monday in March:—his contention being that, by reason of the said enactment of April 2, 1889, he was tried and convicted at a time when a legal term of the said district court could not be held. *Held* that, notwithstanding the emergency clause appended to the act of April 2, 1889, the said act did not operate to invalidate the term of the court which began on April 8. The said act is constitutional, but, the emergency clause to the contrary notwithstanding, it did not take effect until such time as would not deprive any county in the judicial district of its constitutional right to two terms per annum of the district court. *Id.*

4. The relators were charged jointly by indictment with the murder of J. D. Munn, in Navarro county, Texas, on the sixth day of November, 1888. They sued out jointly a writ of habeas corpus for allowance of bail. Upon the hearing of the writ, bail was awarded the relator John Hanson in the sum of three thousand dollars, and was denied to the relator George Hanson. This appeal is jointly prosecuted by the relator John Hanson to secure reduction of the bail allowed below, and George Hanson for an allowance of bail. Upon the evidence adduced on the hearing (for the substance of which see the statement of the case), the judgment is affirmed as to John Hanson, and reversed as to George Hanson, with an award of bail in the sum of five thousand dollars. *Ex Parte Hansons*, 591.

5. Criminal contempt of court consists in the doing of an act in disrespect of the court or its process, or which obstructs the administration of justice, or tends to bring the court into disrepute; and such

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HABEAS CORPUS—*continued.*

contempt, if committed in a justice of the peace's court, may be punished by the justice of the peace by fine not exceeding twenty-five dollars, and imprisonment not exceeding one day. Civil contempt of court consists in failure or refusal to perform an act ordered by the court for the benefit of another party. *Ex Parte Robertson*, 628.

6. The relator, who is constable of precinct number three, of Travis county, was charged with the execution of a writ of sequestration sued out of the justice's court. Failing to execute the same, he was proceeded against in the said justice's court by the plaintiff in the writ. Acting under article 4539 of the Revised Statutes, the justice of the peace adjudged the relator guilty of contempt of his court, fined him in the sum of thirty-nine dollars and nineteen cents, to inure to the plaintiff in the writ of sequestration, and committed him to jail until payment of said fine and costs. *Held* that the failure and refusal of the relator to execute the writ of sequestration constituted civil contempt of the said justice's court, and that the justice exercised his legal authority in so adjudging him guilty, and in imposing the said fine and committing him pending payment thereof. *Id.*

7. A fine imposed for contempt is not "debt" within the meaning of section 18 of the Bill of Rights, which provides that "no person shall ever be imprisoned for debt." *Id.*

8. Judgment and the commitment in this case are both void because they omit the essential recital that it was within the power of the relator, as constable, to execute the writ; and the commitment is void for the further reason that, upon its face, it commits the relator on a fine imposed for criminal contempt. Wherefore the relator is discharged without day. *Id.*

I

IDEM SONANS.

In the indictment, in one place, the name of the injured party is spelled "Fauntleroy," and in another "Fontleroy," and the validity of the indictment is attacked upon the ground of variance in stating the name of the injured party. But *held* that the names as set out are *idem sonans*. *Wilks v. State*, 381.

IMPEACHING TESTIMONY.

The wife of the deceased, who had been previously tried for complicity in the same offense, and had been acquitted, testified for the defense on this trial, and, to impeach her testimony, the State was permitted to prove contradictory statements previously made by her. The objection urged to this by the defense was that she was under arrest at the time she made the said contradictory statements, and that the evidence was hearsay. *Held*, that the objection was properly overruled. Articles 749 and 750 of the Code of Criminal Procedure, excluding confessions made in duress, apply only to the confessions or admissions of *a defendant who is on trial*, made when under arrest.

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IMPEACHING TESTIMONY—*continued.*

and they can not be extended to parties not on trial. Whilst hearsay, so far as the defendant was concerned, the said contradictory statements were admissible to impeach the witness, to which sole purpose they were properly limited by the charge of the court. *Hawkins v. State*, 278.

INCOMPETENT WITNESS.

See WITNESS, 3, 4.

INDICTMENT.

See EXTORTION.

ROBBERY, 1.

1. The indictment alleged the name of the owner of the stolen property to be Burris. The proof showed it to be Burrows. The conviction is assailed upon the ground of variance between the ownership as alleged and proved. But *held* that, as the proof further shows that the owner was commonly known as Burris, the variance is not material. *Taylor v. State*, 44.

2. It is essential in a perjury case not only that the indictment shall allege that the court before which the judicial proceeding in which the perjury is charged to have been committed had jurisdiction of such judicial proceeding, but that fact must be established by the proof. *Wilson v. State*, 47.

3. Indictment for perjury conforming to No. 122 of Willson's Forms is sufficient. *Smith v. State*, 50.

4. In the construction of a statute, the legislative intent, if that intent can be ascertained, must govern even over the literal import of words, and without regard to grammatical rules. Thus construed, article 250 of the Penal Code inhibits any officer of a county, city or town from entering into, on account of himself, any kind of financial transaction with such corporation. The indictment in this case charged the accused with the violation of said article, in that he sold a mule to the county of which he was a county commissioner. *Held*, that such sale constituted a violation of said article, and the indictment was sufficient. *Rigby v. State*, 55.

5. Indictment to charge the fraudulent sale or disposition of mortgaged property must allege the name of the person to whom the same was sold or disposed of, or, if such be the fact, that the name of such person was to the grand jurors unknown. *Alexander v. State*, 94.

6. The second count of the indictment (being the count upon which this conviction was had) charges that certain persons, to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder one Ellick Brown, and that defendant, prior to the commission of said murder by said unknown persons, did unlawfully, wilfully and of his malice aforethought, advise, command and encourage said unknown persons to commit said murder, said defendant not being present at the commission of said murder by said unknown persons. It was objected to the indictment that it neither

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INDICTMENT—*continued.*

named nor gave a description of the unknown persons who committed the murder of Brown. *Held*, that the objection is not sound, and the indictment is sufficient, its purpose and effect not being to charge the unknown persons as the "accused" in this case, but to carge the defendant as an accomplice to the murder of Brown. *Dugger v. State*, 95.

7. It is not essential to the sufficiency of an indictment to charge the offense of betting at a game played with dice, that it shall allege that the accused played the game with another or bet with another person. *Day v. State*, 143.

8. See the statement of the case for the substance of an indictment *held* sufficient to charge the offense of negligent homicide. *Anderson et al. v. State*, 177.

9. A person charged, either in the same or another indictment, with participation in the offense on trial, is not competent to testify in behalf of the accused. It appears in this case that the witness proposed by the defense was indicted, by an incorrect name, for the same offense. *Held* that the proposed witness was properly held incompetent. *Id.*

10. See the opinion in extenso for the charging part of an indictment *held* to comprehend but a single count, and to be sufficient to charge, the accused as an accomplice to murder. *Crook v. State*, 198.

11. The indictment charged that "Mack Green, on or about the first day of May, 1888, in the county and State aforesaid, did, with malice aforethought, kill Sam Smith by shooting him with a gun; contrary," etc. On motion in arrest of judgment, the indictment is *held* a good indictment for murder, and sufficient to sustain a conviction in the first degree. *Green v. State*, 244.

12. This prosecution was for removing mortgaged property out of the State, as that offense is deffned by article 797 of the Penal Code. In the stead of the statutory word "remove," the indictment uses the word "run." *Held*, that the words are equivalent, as the word "remove" is used in the statute. See the statement of the case for the charging part of an indictment *held* sufficient to charge the offense of removing mortgaged property out of the State. *Williams v. State*, 258.

13. See indictment sufficient to charge swindling. *Scott v. State*, 264.

14. The common law rule that an indictment for perjury must allege correctly the day on which the perjury was committed, and that a variance between the time alleged and that proved would be fatal, has been so changed by statute in this State, that the indictment need only allege some time anterior to the presentment of the same, and not so remote as to be barred by the statute of limitations; with which allegation the proof, to be sufficient, must concur. *Lucas v. State*, 322.

15. "Writing" or "written," as those terms are used in the statutes of this State, include "printing" or "printed"; and it is not a valid objection to an indictment that it is partly written and partly printed. *O'Bryan v. State*, 339.

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INDICTMENT—*continued.*

16. The defendant's motion to set aside the indictment was based upon the statutory ground that a person not authorized by law was present when the grand jury deliberated and voted upon the accusation against him. It appears by the defendans's bill of exceptions that the grand jury for the term was duly organized on December 3, and that it was discharged for the term on December 13; that soon afterward the court took a recess, and, upon reconvening after the recess, ordered the sheriff to reassemble the sixteen persors selected originally by the jury commissioners at the June term to serve at the said December term, viz., the twelve who had been impaneled and the four who had not. Of the sixteen thus summoned, the twelve who had and one W. who had not been impaneled, reassembled, when one of the said twelve was excused by the court, and the said W. was placed upon the panel in his stead. The contention of the defense is that the trial court had no power to excuse the grand juror after he had been duly impaneled; that the status of the excused person as a legal grand juror was not affected by the action of the court, and that the legal effect of impaneling the substituted juror W. was to create an unconstitutional grand jury of thirteen persons; and that the presence in the grand jury room of the said W. was the presence of "a person not authorized by law." *Held*, that the motion to set aside the indictment was properly overruled, and that the action of the court was correct, as conforming to article 391 of the Code of Criminal Procedure, which provides as follows: "When a grand jury has been discharged by the court for the term, it may be reassembled by the court at any time during the term, and in case of failure of one or more of the members to reassemble, the court may complete the panel by impaneling other qualified persons in their stead in accordance with the rules prescribed in this chapter for completing the grand jury in the first instance." *Trevinio v. State*, 372.

17. In the indictment, in one place, the name of the injured party is spelled "Fauntleroy," and in another "Fontleroy" and the validity of the indictment is attacked upon the ground of variance in stating the name of the injured party. But *held* that the names as set out are *idem sonans*. *Wilks v. State*, 381.

18. Indictment or information for theft is fatally defective if it fails to charge directly that the *taking* was *fraudulent*. *Chance v. State*, 441.

19. Indictment for burglary charged that the house was entered with the intent to commit theft, but fails to charge that the entry was made with the fraudulent intent to take the property from the possession of the owner; and the allegation of theft fails to charge that the property was taken from the *possession* of the owner. *Held* insufficient to charge the offense. *O'Brien v. State*, 448.

20. Allegation in an indictment for murder that the deceased was killed by a shot fired from a gun will admit proof that the fatal shot was fired from any kind of a fire arm. But in this case the indictment alleged that the deceased was shot and killed by the defendant "with a weapon

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INDICTMENT—*continued.*

to the grand jurors unknown." To prove the diligence of the grand jury to ascertain the character of the weapon used, the State asked the foreman of the grand jury: "What effort, if any, did you make to learn the manner and cause of the death of deceased, and what conclusion did you arrive at?" The witness replied as follows. "We had a great many witnesses before the grand jury, and we returned this indictment, which we thought was right." *Held* that the question was erroneously allowed, because upon the question of diligence it was too broad and comprehensive, and was calculated to and did elicit an answer at once incompetent and prejudicial to the rights of the defendant. *Monk v. State*, 450.

21. Indictment, to be sufficient to charge the offense of fraudulently disposing of mortgaged property, with intent to defraud, etc., must allege the name of the person to whom the mortgaged property was disposed or sold, or that the name of sech person was to the grand jury unknown. *Armstrong v. State*, 462.

22. The State abandoned all but the last count in the indictment. The defense maintains that the effect of such abandonment is to eliminate the caption of the indictment and leave the last count insufficient to charge an offense because it does not commence, "In the name and by the authority of the State of Texas," and does not charge that it was presented by a grand jury of Wilbarger county. *Held*, that the proposition is hypercritical, and that the caption and commencement of an indictment apply to and constitute a part of each and every count contained therein. *West v. State*, 472.

23. Another equally well settled rule is that neither the principal nor the sureties in a bail bond or recognizance can question the sufficiency of the indictment in a scire facias proceeding to forfeit the same. *Langan et als. v. State*, 498.

24. The recognizance in this case binds the principal to appear on an indictment for assault with intent to rape. The said indictment is insufficient to charge that offense, but is sufficient to charge an aggravated assault and battery. The defendants' motion to quash the recognizance is based upon the ground that it does not obligate the principal to appear and answer the offense charged in the indictment. But *held*, that, as the intent of the indictment to charge assault to rape is manifest, the last rule announced obtains, and the trial court properly overruled the motion. *Id.*

25. Article 470 of the Penal Code denounces as guilty of a criminal offense any person who with intent to defraud shall put into any vessel or package containing merchandise or other commodity usually sold by weight, *any article whatever* of less value than the merchandise with which said vessel or package is apparently filled, or any person who, with intent to defraud, shall sell or barter, or give in payment, or expose to sale, or ship for exportation, any such vessel or package of merchandise or other commodity with any such article of inferior *value* concealed therein. Article 471 of the Penal Code denounces as guilty of a criminal offense any person who shall, with intent to de-

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INDICTMENT—*continued.*

ceive and defraud, conceal within any vessel or package containing merchandise or other commodity, any merchandise or commodity of a *quality* inferior to that with which such vessel or package is apparently filled or any substance of less value, etc. The distinction between the two offenses, construed in connection with each other, is that, whereas the latter offense may be committed by concealing in the vessel or package either like merchandise of inferior quality or any substance of less value; the former offense can be committed only by putting into the vessel or package a substance different in character and of less value than that with which the vessel or package is apparently filled; and whereas, it is an offense under article 470 to fraudulently offer for sale the falsely packed vessel or package, the offering for sale under the latter article is not an offense. The indictment in this case is formulated under article 470, and charges the *sale* of four bales of cotton falsely packed with cotton of inferior quality to that with which they were apparently filled. *Held*, that the indictment charges no offense against the law. *Lidtke v. State*, 500.

26. Indictment or information is not bad for duplicity because it contains several counts charging different misdemeanors. *Alexander v. State*, 533.

27. It is not required that each and every count in an indictment shall conclude with the words "against the peace and dignity of the State," it being sufficient if the instrument as a whole so concludes. *Id.*

28. If the written instrument declared upon as a forgery is so incomplete in form as not to import a legal liability, then, to sufficiently charge forgery upon it, the indictment must allege such facts as will invest it with legal force and show that, if genuine, it would create a legal liability. See the opinion for an indictment *held* insufficient to charge forgery, because, in the absence of inuendo averments, the indictment declared upon is incomplete in form and substance, and does not import a legal liability. *King v. State*, 567.

29. The purpose of the indictment in this case was to charge the theft of a horse from the possession of one Henry Wright, but in drafting the indictment the pleader omitted the word "of" after the word possession. *Held*, that the omission is fatal to the conviction inasmuch as the omitted word is essential to the accusation. *Riley v. State*, 606.

INFORMATION.

See INDICTMENT, 16

1. See the statement of the case for an information *held* sufficient to charge the offense of offering adulterated food for sale. *Sanchez v. State*, 14.

2. Under the law of this State an information is insufficient for any purpose unless founded upon a complaint, filed therewith, charging an offense. The indictment in this case charged that the perjury was committed on the trial of a judicial proceeding in the county court

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INFORMATION—*continued.*

"wherein one Bean was duly and legally charged by information," etc. To support the allegation of jurisdiction of the county court, the State introduced in evidence the information, but not the complaint. *Held*, that the proof was insufficient. *Wilson v. State*, 47.

3. In a criminal action for malicious prosecution under article 273 of the Penal Code, it is not essential that the information shall allege that the prosecution against the injured party had ended before the information was presented. See the opinion for an information *held* sufficient to charge such a malicious prosecution as constitutes the offense defined in said article 273. *Dempsey v. State*, 269.

4. Information is insufficient to charge an offense unless it concludes with the words: "against the peace and dignity of the State." The complaint, however, being a good one and sufficient to sustain an information, the cause is not dismissed, but is remanded in order that a valid information may be filed upon the complaint. *Wood v. State*, 538.

5. A "gin" is not one of the places or houses designated by the statute as a "public place." To charge the offense of playing cards in a public place, "to wit, a gin," the information should have charged the facts which constituted the gin a public place. *Dailey v. State*, 569.

6. To charge the offense denounced by article 683 of the Penal Code, the information or indictment must charge such acts of injury to property as do not come within the description of any of the offenses against property otherwise provided for in the Penal Code. The indictment in this case is formulated under said article 683, and charges an injury to a fence—an act which comes within the definition of two other offenses provided for in the Penal Code. (Arts. 684, 684a.) Exception that the acts charged constitute the offense defined in article 684 should have been sustained by the court. *White v. State*, 638.

INJURING A FENCE.

See MALICIOUS MISCHIEF, 3, 4.

INTENT

1. An assault and a specific intent to murder are two elements which must concur in order to constitute the offense of assault with intent to murder. The intent must be established as an inference of fact to the satisfaction of the jury, but the jury may draw that inference, as they draw all others, from any fact in evidence which to their minds fairly proves its existence. *Trevinio v. State*, 372.

2. The essential ingredient of the offense of assault with intent to murder is that the assault was accompanied by the specific intent of the accused to murder, and this ingredient must be established to the satisfaction of the jury. *Wood v. State*, 393.

3. The offense of assault with intent to murder is proved when it is shown that, had death resulted from the assault, the offense would have been murder. Another test is that "if the assault is voluntary, committed with deliberate design and with an instrument capable of producing death in such manner as evidences an intention to take life,

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INTENT—*continued.*

and there are no extenuating circumstances, it is an assault with intent to murder." *Id.*

4. The rule is statutory that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the forbidden act." And it is elementary that "a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears." *Id.*

5. If a party intending to commit murder, uses a deadly weapon in such a manner as that his intent is apparent or may be fairly inferred from the act, he can not, by abandoning any further attempt at violence, mitigate the effect of his previous act or intention; and it is for the jury to determine, under appropriate instructions upon the law, whether, by what he did before he abandoned the further execution of his plans, he really and in fact intended to commit murder. And if they find that he did so intend to commit murder, and the facts justify the finding, then this court will not interfere with the verdict. *Id.*

6. See the statement of the case for evidence held sufficient to support a conviction for assault to murder. *Id.*

INTERPRETATION OF THE CODES.

See FALSE PACKING.

1. In the construction of a statute, the legislative intent, if that intent can be ascertained, must govern even over the literal import of words, and without regard to grammatical rules. Thus construed, article 250 of the Penal Code inhibits any officer of a county, city or town from entering into, on account of himself, any kind of financial transaction with such corporation. The indictment in this case charged the accused with the violation of said article, in that he sold a mule to the county of which he was a county commissioner. *Held*, that such sale constituted a violation of said article, and the indictment was sufficient. *Rigby v. State*, 55.

2. In construing statutory enactments the courts must so interpret the legislative intent as to harmonize the provisions of the act with the Constitution, if it can be reasonably done. *Ex Parte Murphy*, 492.

3. Adultery is an offense which, under the present law of this State, can be committed in but one of two ways: 1, by the parties (one or both being legally married to some other person) *living together* and having carnal intercourse with each other; and, 2, by the parties having habitual carnal intercourse with each other without living together. To convict under the first mode the proof must show a *living together* of the parties, but need show no more than a single act of carnal intercourse, but under the second mode the carnal intercourse must be shown to have been habitual. *Bird v. State*, 635.

J

JOINT OFFENDERS.

A verdict against joint offenders on a joint trial, to be valid, must assess a separate penalty against each offender. Flynn v. The State, 8 Texas Ct. App., 389, and Matlock et al. v. The State, 25 Id., 716, and

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JOINT OFFENDERS—*continued.*

Cunningham v. The State, 26 Id., 83, approved. ***Medis & Hill v. State,*** **194.**

JUDGMENT.

See CONTEMPT OF COURT.

JURISDICTION.

1. Being convicted and fined in the recorder's court of Galveston city for a violation of a penal ordinance of the city, the defendant appealed to the criminal district court of Galveston county, by which court his appeal was dismissed on the ground that it had no jurisdiction of such municipal offenses, inasmuch as no right of appeal in such cases was conferred by the special charter of Galveston city, nor by the laws of the State, and because the offense was not against the laws of the State nor prosecuted in the name of "The State of Texas." *Held* that the appeal was erroneously dismissed. See the opinion in extenso for a collocation and construction of the various statutory provisions relevant to the question. *Bautsch v. State*, 342.

2. In all criminal cases tried before mayors and recorders of incorporated cities, the general policy and intent of the statutes of Texas secure to defendants a right of appeal commensurate with that from convictions in justices' courts. The fact that the special charter of a city wholly ignores such right of appeal from convictions for violation of the municipal ordinances can not frustrate the right of appeal from such convictions, notwithstanding the municipal offense consists in an act which is not penal under the general laws of the State. *Id.*

JURY LAW.

1. In misdemeanor cases a jury may be permitted by the court to separate, as provided by article 688 of the Code of Criminal Procedure, but this rule does not authorize the court to reconvene a jury after it has been finally discharged, in order to remedy an informality in a verdict rendered by it, or to return another verdict. ***Ellis v. State,*** **190.**

2. When it is shown that a verdict of guilty was probably influenced by the statement of a juror to his colleagues assailing the credibility of a witness for the defendant, a new trial should be granted. *Lucas v. State*, 322.

3. One of the disqualifications of a juror is that he has served as a juror in the district court for six days during the preceding six months. *Held*, that service as a juror for but *five* days is not a disqualification. *Monk v. State*, 450.

4. The defendant's motion for new trial sets up that, though on his *voir dire* the juror Doss declared his competency to sit as a juror, he was, in fact, as ascertained by the defendant after the trial, an incompetent juror, being neither a resident of Travis county, a house-holder

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JURY LAW—*continued.*

in said county, nor a freeholder in the State, and that before the trial he declared his prejudice against the defendant. The district attorney filed a written denial of the allegations made in the motion for new trial, but introduced no evidence in support of said denial. In this state of the case, the juror Doss must be held to have been incompetent, and his service upon the jury entitled the defendant to a new trial. *Brackenridge v. State*, 513.

5. A brother-in-law of the person alleged in the indictment to be the person injured by the act of the defendant is not a competent juror on the trial of the latter. *Powers v. State*, 700.

6. Note the case for exceptions to the proceedings had upon the organization of the petit jury held to have been erroneously overruled. *Cahn v. State*, 709.

M

MALICE.

See CHARGE OF THE COURT, 21.
DEFINITIONS, 3.
MURDER, 33.

"MALICIOUS MISCHIEF."

1. No such offense as malicious mischief is known, *per se*, to the law of this State, and an appeal from a conviction for unlawfully breaking and pulling down and injuring the fence of another must be dismissed when the recognizance for appeal describes the offense as malicious mischief. *Koritz v. State*, 53.

2. The proof shows that the defendant was the sole owner of a dividing fence between his farm and the farm of one McN.; that, without notice to McN. in writing, he pulled down the said dividing fence, exposing McN.'s growing crops to the depredations of stock; that McN., to protect his crops, again connected his fence to the defendant's fence on the defendant's land, when the defendant again pulled it down. *Held* that, although the sole owner of the dividing fence, the defendant had no right to remove it without having given McN., his agent or attorney, notice in writing of his intention to do so for at least six months prior to so doing. McN., in connecting his fence with that of the defendant, for the purpose of preventing stock depredations on his growing crops, notwithstanding the connecting point was on the defendant's land, was not a trespasser and violated no law. (See Laws of 1887, page 30.) *Jamison v. State*, 442.

3. To charge the offense denounced by article 683 of the Penal Code, the information or indictment must charge such acts of injury to property as do not come within the description of any of the offenses against property otherwise provided for in the Penal Code. The indictment in this case is formulated under said article 683, and charges an injury to a fence—an act which comes within the definition of two other offenses provided for in the Penal Code. (Arts. 684, 684a.) Exception that the

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"MALICIOUS MISCHIEF"—*continued.*

acts charged constitute the offense defined in article 684 should have been sustained by the court. *White v. State*, 638.

4. On the trial the defense requested the court to instruct the jury as follows: "1. If you believe from the evidence of the witnesses that J. T. White had leased the farm of Watson for the year 1887, that he was for the time owner of said premises, and had the right to use the premises for his own convenience, so that he did not use them to the injury of another, and in the use of the same he had a right to open the fence for his own convenience. 2. Gentlemen, if you believe from the evidence that defendant cut the fence of Watson for his own convenience, and not maliciously for the purpose of injuring Watson, you will acquit. If you have a reasonable doubt as to defendant's guilt you will acquit." *Held*, that, being correct in principle, and embodying issues made by the proof, the refusal of the court to give said instructions was error. *Id.*

MALICIOUS PROSECUTION.

1. In a criminal action for malicious prosecution under article 273 of the Penal Code, it is not essential that the information shall allege that the prosecution against the injured party had ended before the information was presented. See the opinion for an information *held* sufficient to charge such a malicious prosecution as constitutes the offense defined in said article 273. *Dempsey v. State*, 269.

2. To authorize a conviction for malicious prosecution, the proof must show that the prosecution alleged to be malicious was actuated by malice. *Id.*

3. "Any unlawful act done wilfully and purposely to the injury of another is as against that person malicious; this wrong motive, when it is shown to exist, coupled with a wrongful act, wilfully done to the injury of another, constitutes legal malice." *Id.*

4. Not only must the proof show that the alleged malicious prosecution was actuated by legal malice, but it must show a want of probable cause for instituting the alleged malicious prosecution. By probable cause is meant the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted. Under this rule a prosecution, although instituted with legal malice, would not be a penal offense if probable cause existed to believe the offense charged was committed by the party prosecuted. See the opinion on the question; and note that in this case though legal malice existed, probable cause also existed. *Id.*

5. On the trial, the court below permitted the justice of the peace before whom the alleged malicious prosecution was had to testify that he discharged the alleged injured party because, in his opinion, the evidence did not support the charge brought against him. *Held* error. *Id.*

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MANSLAUGHTER.
See CHARGE OF THE COURT, 9.
EVIDENCE, 8.
In a trial for murder the inculpatory evidence tended to prov- that the defendant and his brother waylaid the deceased, and that he was fired upon and killed by one or both of them—both being present and acting together in perpetrating the homicide. According to the defense, the meeting of the deceased with the defendant and his brother was accidental, and the first shot was fired by the deceased at the defendant's brother, who, in self defense, and with no co-operation of defendant, fired upon and killed the deceased. The trial court gave in charge to the jury the law of murder of the first degree, and of justifiable homicide in self defense, but refused to give in charge the law of murder of the second degree and of manslaughter. *Held*, that the charge covered the only issues in the case, and properly omitted the law of murder of the second degree and of manslaughter. *Green v. State*, 244.

MISCONDUCT OF THE JURY.
See JURY LAW, 2.

MUNICIPAL COURTS.
See JURISDICTION.

MURDER.
1. See the statement of the case for evidence *held* insufficient to support a conviction for murder of the second degree because it rests upon the testimony of an insufficiently corroborated accomplice. *Stouard v. State*, 1.
2. It is an established rule of practice in this State that, upon the trial of an offense which comprehends different degrees it becomes the imperative duty of the trial court to instruct the jury upon the law applicable to every degree or grade of offense indicated by the evidence, however feeble such evidence may be; that, if there be a doubt as to which of two or more grades of the offense the accused may be guilty, the law as to all of such grades should be charged, and that the trial court should omit to charge the law of any particular grade only when it is to no extent whatever raised by the evidence. See the statement of the case for evidence adduced on the trial for murder, which, though sufficient to establish the express malice essential to constitute murder of the first degree, is not of such character as to absolutely preclude the jury from finding therefrom a killing upon implied malice, and, therefore, murder in the second degree; wherefore the omission of the trial court to instruct the jury upon the law of murder of the second degree was error. *Blocker v. State*, 16.
3. The accused, being on trial for murder, contends that, under the law of this State, it is the duty of the trial judge, in murder cases, without regard to the evidence adduced, to instruct the jury as to the

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MURDER—*continued.*

law of murder of the second degree. But *held* that, notwithstanding the apparent plausible construction of the statutes upon which the proposition is maintained, the doctrine obtains in this State that the trial court may decline to submit to the jury the issue of murder of the second degree when the evidence wholly fails to present that issue. See the opinion in extenso upon the question, and note the suggestion relative to the charge in trials for murder. *Id.*

4. Evidence sufficient to support a conviction for murder of the second degree. *Miller v. State*, 63.

5. Evidence sufficient to support a conviction for murder of the first degree. *Peace v. State*, 83.

6. See the statement of the case in this, and in the case of ex parte Smith and Hughes, 26 Texas Court of Appeals, 134, for evidence *held* sufficient to support a conviction of murder of the first degree. *Hughes v. State*, 127.

7. The act of killing, in this case, necessarily included an assault and battery, and the charge of the court defining murder sufficiently embraced assault and battery, but the trial court, in addition, gave in charge an independent definition of assault and battery. *Held* material error because excepted to. Moreover it was matter calculated only to encumber the charge and confuse the jury. *Crook v. State*, 198.

8. As a predicate for the introduction in evidence of the written testimony of one T., as delivered at the examining trial, it was proved that the said T. resided in the Indian Territory at the time of the examining trial and at the time of this trial. *Held* that the predicate was sufficiently established. *Id.*

9. The defense offered to prove by the witness N. the statement made to him by an one D. to the effect that the gun with which it was claimed by the State the killing was done was found by D. at a certain place, which proof, upon objection by the State, was excluded as hearsay. *Held* that the ruling was correct. *Id.*

10. The indictment charged that "Mack Green, on or about the first day of May, 1888, in the county and State aforesaid, did, with malice aforethought, kill Sam Smith by shooting him with a gun; contrary," etc. On motion in arrest of judgment, the indictment is *held* a good indictment for murder, and sufficient to sustain a conviction in the first degree. *Green v. State*, 244.

11. In a trial for murder the inculpatory evidence tended to prove that the defendant and his brother waylaid the deceased, and that he was fired upon and killed by one or both of them—both being present and acting together in perpetrating the homicide. According to the defense, the meeting of the deeceased with the defendant and his brother was accidental, and the first shot was fired by the deceased at the defendant's brother, who, in self defense, and with no co-operation of defendant, fired upon and killed the deceased. The trial court gave in charge to the jury the law of murder of the first degree, and of justifiable homicide in self defense, but refused to give in charge the

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law of murder of the second degree and of manslaughter. *Held*, that the charge covered the only issues in the case, and properly omitted the law of murder of the second degree and of manslaughter. *Id.*

12. Evidence sufficient to support a capital conviction for murder. *Hawkins v. State*, 278.

13. See the statement of the case for evidence objected to by a defendant on trial for murder, *held*, in view of the other proof in the case, to have been properly admitted; and note that the evidence as a whole is held amply sufficient to support a conviction for murder in the second degree. *Moody v. State*, 287

14. Omission or refusal of the trial court to submit in charge to the jury the law of murder in the second degree, when the evidence establishes only the higher grade, is not error. *McCoy v. State*, 415.

15. In this case the general charge of the court clearly and concisely hinged the guilt of the accused upon the question whether he was present when C. killed the deceased, and, knowing the unlawful intent of C., aided or encouraged C. in the killing of the deceased; or whether he advised or agreed to the killing of the deceased by C., and was present when C. killed the deceased. The defense requested an alternative charge based upon the theory that C., unaided in any manner by the accused, shot and killed deceased, and that the shooting of one E., at the same time and place by the accused, was a distinct and separate transaction from the killing of the deceased by C. The trial court gave the requested instruction with the following qualification: "The foregoing charge is given in subordination to the general charge regarding principals." This qualification was not excepted to, but was urged as cause for new trial, and is relied upon in this court for reversal, the defense maintaining that, if the evidence does not clearly establish its theory, it leaves it in doubt, and that its said theory should have been submitted to the jury affirmatively, subordinate to no other charge and untrammeled by any qualification whatever. *Held*, that abstractly the objection is sound, and if based upon sufficient evidence or opposed by insufficient inculpatory proof, would require a reversal of the conviction; but, the evidence not only refuting the theory, but establishing beyond peradventure the propositions propounded by the general charge, the qualification appended to the special charge by the trial judge did not inure to the injury of the defendant. *Id.*

16. See the statement of the case for evidence *held* sufficient to support a capital conviction for murder. *Id.*

17. Allegation in an indictment for murder that the deceased was killed by a shot fired from a gun will admit proof that the fatal shot was fired from any kind of a fire arm. But in this case the indictment alleged that the deceased was shot and killed by the defendant "with a weapon to the grand jurors unknown." To prove the diligence of the grand jury to ascertain the character of the weapon used, the State asked the foreman of the grand jury: "What effort, if any, did you make to learn the manner and cause of the death of deceased, and what conclusion did

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you arrive at?" The witness replied as follows. "We had a great many witnesses before the grand jury, and we returned this indictment, which we thought was right." *Held* that the question was erroneously allowed, because upon the question of diligence it was too broad and comprehensive, and was calculated to and did elicit an answer at once incompetent and prejudicial to the rights of the defendant. *Monk v. State*, 450.

18. The indictment having alleged that the deceased came to his death by being shot, it devolved upon the State to establish that fact by competent evidence. See the opinion for evidence admitted on the issue *held* incompetent because in part hearsay, and in part the opinion of a witness based upon investigation to which the defendant was not a party. *Id.*

19. See the statement of the case for evidence *held* insufficient to support a conviction for murder in the second degree *Id.*

20. The indictment charged the murder of one C. Spears. The State proved that subsequent to the disappearance and alleged murder of Spears the defendant collected from one A. a sum of money due by A. to one *Pierce*. *Held*, that in view of proof showing the said Pierce and the said Spears to be one and the same person, the evidence was properly admitted. *Jump v. State*, 459.

21. The sheriff of Dallas county was permitted, over objection by defendant, to testify that, subsequent to the alleged murder, he arrested Monk, a party charged by separate indictment with the same offense, in a distant county. *Held*, error, because even if the evidence were sufficient to establish a conspiracy between defendant and Monk, the proof related to matters transpiring after the consummation of the conspiracy. *Id.*

22. The statute expressly requires that in convictions for murder the verdict shall specify the degree of murder of which the defendant is found guilty. The failure of the verdict to so specify the degree is cause for reversal. *Zwicker v. State*, 539.

23. The evidence in this case shows conclusively that the conflict was provoked and brought on by either the defendant or the deceased, and that the other, in resisting the attack, acted upon real or apparent necessity. *Held*, that such proof excludes the idea of mutual combat, and in submitting that issue to the jury the charge of the trial court was erroneous. *Kelley v. State*, 562.

24. Article 572 of the Penal Code provides that "homicide is justifiable in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article (murder, maiming, disfiguring or castration), and in such cases all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." In submitting this law to the jury, under the facts of this case, the trial court erred. See the opinion for a special charge on justifiable homicide, requested by the defense in lieu of the above charge, the refusal of which, in view

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of the proof, was error; and note the approval on this subject of Ormond's case, 24 Texas Ct. App., 496. *Id.*

25. The proof shows that about one month before the homicide involved in this prosecution, the deceased killed one C., a relative of the defendant, and that the said killing resulted in creating relations of open and avowed enmity between the defendant and one S. on the one side, and the deceased on the other; that these relations became so strained and dangerous that mutual friends finally intervened and induced the parties to agree, on the part of defendant and S., not to molest the deceased, and on the part of deceased that, in visiting Hempstead, he would only carry his Winchester rifle in his buggy, or, if on horseback, in the scabbard to the saddle, and that any other mode of carrying the said gun was to be construed by defendant and S. as a declaration of hostility by deceased; and that threats uttered by either party were by the mutual friends to be reported to the other party. The proof further shows divers breaches by the deceased of the agreement as to the carrying of the gun, and frequent threats of a deadly nature uttered by deceased, some of which were communicated to the defendant and S. The inculpatory proof shows that, when shot, the deceased was sitting on his horse, with his gun across his lap, and his back toward the place from whence he was shot, and that, so far as was apparent, he was unconscious of the proximity of any person save those to whom he was talking, that he fired no shot, and that he made no motion to seize his gun, at least until immediately before he was fired upon, when he was warned by a bystander to "look out;" that a few minutes prior to the shooting the defendant and S., from a short distance, remarked deceased's presence, and immediately, by a circuitous route, and through an alleyway, approached to within a few feet of the deceased, and opened fire upon him from behind him, with fatal effect, and continued to shoot him while in the death agony. The defendant produced testimony to the effect that he and S. went to the place of the killing in the manner they did to execute a warrant for the arrest of a desperate criminal, who was reported to them to be at that place, and that their coming upon the deceased was sudden and wholly unexpected. Upon this state of proof the defendant claims that, by reason of the recent threats and acts of the deceased, in violation of the agreement, and their sudden and unexpected discovery of him with his gun carried contrary to the agreement, they were confronted with such appearance of danger as was calculated to arouse, in men of ordinary temper, such emotions as would render the mind incapable of cool reflection; and upon this theory he demanded of the court the submission to the jury of the issue of manslaughter. *Held* that the proof did not present, and the trial court did not err in refusing to submit to the jury the issue of manslaughter, because the evidence does not establish "adequate cause," nor show any purpose on the part of the deceased, when killed, to execute threats previously made by him. *McDade v. State*, 641.

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26. See the statement of the case for a charge of the court on the issue of self defense, *held* sufficient under the evidence adduced; and see the opinion for requested instructions on the same question *held* to have been properly refused as unwarranted by any proof in the case. *Id.*

27. Upon the doctrine of "reasonable doubt" the trial court charged the jury as follows: "The defendant is presumed to be innocent until his guilt is established by the evidence to the satisfaction of the jury beyond a reasonable doubt"—omitting the statutory word "legal" before the word "evidence." *Held*, that the omission was immaterial, and the instruction in substantial compliance with the statute. *Id.*

28. In the examination of his own witness the defendant proved the declaration of deceased to the said witness, that defendant had uttered threats against him, deceased. Defendant requested the court to charge the jury that such declaration of the deceased could not be considered by them as evidence that such threats were made by the defendant. *Held* that, having himself elicited the adverse testimony, the defendant could not he heard to complain, and the court did not err in refusing the instruction. *Id.*

29. See statement of the case for evidence *held* sufficient to support a conviction for murder in the second degree. *Id.*

30. A State's witness testified that he arrested the defendant on the day of the shooting and near where it occurred, but was unable to state what length of time had elapsed since the shooting occurred. The defense, on cross examination, proposed to prove by the witness the statement made to him by defendant, when arrested, about the shooting. The proposed proof was excluded as no part of the res gestæ. *Held*, correct. *Cahn v. State*, 709.

31. The testimony of the defense tends to show that about the time of the fatal shooting the defendant claimed that the deceased was indebted to him a sum of money. It also shows that the employment of the defendant as the business manager, bookkeeper and confidential agent of the deceased terminated in June, 1887. In rebuttal of the defendant's claim of money due him by the deceased, the State introduced in evidence, over objection of defendant, a promissory note executed by the deceased in favor of the defendant, dated June 2, 1887, which showed by defendant's indorsement to have been paid, and also a receipt, executed on the same day by the defendant, acknowledging the payment in full by deceased of all claims then due. *Held*, that the trial court did not err in admitting the said note and receipt in evidence. *Id.*

32. During the progress of the trial the defendant's counsel requested permission of the court to consult a State's witness with reference to the testimony he would give in the case. The court granted the request, but the witness refused to disclose his testimony to the counsel, and the latter moved the court to compel the witness so to do. The court refused the motion, and the defendant excepted. *Held*, that the ruling was not error. *Id.*

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33. As a general definition of malice, the trial court instructed the jury as follows: "Malice means a settled purpose or intention to seriously injure or destroy another." *Held*, erroneous. *Id.*

34. In view of the evidence, the trial court erred in omitting to instruct the jury that, if defendant provoked the contest with deceased, but not with the intention of killing or doing him serious bodily injury, he would not, by such provocation, be wholly deprived of the right of self defense, but that in such case self defense might be availed of by him to the extent of reducing the degree of homicide to a grade less than murder. *Id.*

N

NEGLECT OF OFFICIAL DUTY.

In order to warrant the conviction of an overseer of a public road for failure, neglect or refusal to perform the duties of his office, it devolves upon the State to show that such failure, neglect or refusal on his part was wilful—that is, with evil intent, with legal malice, without legal justification, and with no reasonable ground to believe his action legal. Such overseer is charged only with reasonable diligence and effort in the discharge of his duty, and can not be held criminally responsible for failing to keep his road in repair, when it is shown that to do so with the means available to him is an impossibility. If he exercised reasonable diligence and effort, no wilful failure, neglect or refusal to discharge his duty can be imputed to him. *Moore v. State*, 439.

NEGLIGENCE.

Negligence by omission consists in the omission to perform an act with the performance of which the party is especially charged, and there can be no criminal negligence in the omission to perform an act which it is not the express duty of the party to perform. Under this rule brakemen on a railway train, whose duty is shown to pertain in no degree to the operation of a locomotive, nor to the watching of the railway track, nor the sounding of the danger signal, can not be held liable for the killing of a person by the locomotive, operated by the engineer and fireman, upon whom the duty of operating it exclusively devolved. See the statement of the case for evidence *held* insufficient to support a conviction for negligent homicide. *Anderson et al. v. State*, 177.

NEGLIGENT HOMICIDE.

1. See the statement of the case for the substance of an indictment *held* sufficient to charge the offense of negligent homicide. *Anderson et al. v. State*, 177.

2. A person charged, either in the same or another indictment, with participation in the offense on trial, is not competent to testify in behalf of the accused. It appears in this case that the witness

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NEGLIGENT HOMICIDE—*continued.*

proposed by the defense was indicted, by an incorrect name, for the same offense. *Held* that the proposed witness was properly held incompetent. *Id.*

3. Negligence by omission consists in the omission to perform an act with the performance of which the party is especially charged, and there can be no criminal negligence in the omission to perform an act which it is not the express duty of the party to perform. Under this rule brakemen on a railway train, whose duty is shown to pertain in no degree to the operation of a locomotive, nor to the watching of the railway track, nor the sounding of the danger signal, can not be held liable for the killing of a person by the locomotive, operated by the engineer and fireman, upon whom the duty of operating it exclusively devolved. See the statement of the case for evidence *held* insufficient to support a conviction for negligent homicide. *Id.*

NEWLY DISCOVERED EVIDENCE.

The indictment in this case charged an assault to rape by force, and the allegation was supported by the testimony of the prosecutrix. The proof for the defense, however, not only contradicted her testimony materially, but tended to prove her consent. Upon this state of evidence the defense asked a new trial to produce newly discovered evidence strongly supporting the theory of consent. *Held* that, under the facts in proof, the new trial should have been awarded on the newly discovered evidence adduced by the defense. *Reed v. State*, 317.

NEW TRIAL.

See ROBBERY, 1.

1. The only inculpatory evidence against the accused was the testimony of two witnesses to the effect that, subsequent to the theft of the property, they saw the same removed from a place of concealment by three parties, one of whom they believed, but were not positive, was the defendant. In anticipation of this evidence, the defendant applied for a continuance to secure a witness by whom to establish his presence at another place at the time the property was removed from the place of concealment. Being denied the continuance, and convicted, the defendant asked for new trial because of the ruling of the court upon his application for continuance. The new trial was refused upon the ground (as was the continuance) that the proposed alibi did not cover the time of the theft of the property. *Held*, that the action of the trial court was error, not only because of the inherent weakness of the inculpatory proof, but because an alibi is available, not merely to meet the main issue in the case, but any criminative fact relied upon by the State. *Taylor v. State*, 44.

2. Even if the absent testimony set out in an application for continuance be both admissible and probably true, it will not, if immaterial, require the award of a new trialbecause of the refusal of the continuance. *Peace v. State*, 83.

3. In support of the motion for new trial, the defense filed the

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affidavit of a third person to the effect that after the trial of Sarah Washington, for the same offense, and before the trial of the defendant, one of the jurors who tried the defendant, said that the said Sarah Washington should have been awarded the death penalty, and that the testimony on her trial and that on the trial of defendant was essentially the same. The counter affidavit of the impugned juror affirms that he had no recollection of making the statement imputed to him, and that, if he made it, he made it in jest, and that he tried the defendant without bias or prejudice, and solely upon the evidence adduced and the law given in charge. *Held*, that the motion for new trial was properly overruled. *Hawkins v. State*, 273.

4. The indictment in this case charged an assault to rape by force, and the allegation was supported by the testimony of the prosecutrix. The proof for the defense, however, not only contradicted her testimony materially, but tended to prove her consent. Upon this state of evidence the defense asked a new trial to produce newly discovered evidence strongly supporting the theory of consent. *Held* that, under the facts in proof, the new trial should have been awarded on the newly discovered evidence addeced by the defense. *Reed v. State*, 317.

5. When it is shown that a verdict of guilty was probably influenced by the statement of a juror to his colleagues assailing the credibility of a witness for the defendant, a new trial should be granted. *Lucas v. State*, 322.

6. The application for continuance shows that the defendant sued out as many as four subpœnas and one attachment for the absent witness, who was a resident of Dallas county, and alleged that by the absent witness he would prove that the alleged injured party was the aggressor, and that he struck said party only in defense. The testimony of the prosecuting witness was not only contradicted as to material matter by the witnesses for the defense, but they testified that the prosecuting witness cursed the defendant, and struck him before defendant struck the prosecuting witness, and that, when the defendant finally struck the two blows inflicted upon the prosecuting witness, he, defendant was retreating. *Held* that the diligence being sufficient, and the absent testimony being, in view of the proof, both material and probably true, a new trial should have been awarded. *Stevens v. State*, 461.

7. If, after conviction, it appears that the absent testimony (to secure which the application for continuance discloses due diligence) was both material, and, in the light of the proof on the trial, probably true, a new trial should be awarded. *Black v. State*, 495.

8. The defendant's motion for new trial sets up that, though on his *voir dire* the juror Doss declared his competency to sit as a juror, he was, in fact, as ascertained by the defendant after the trial, an incompetent juror, being neither a resident of Travis county, a householder in said county, nor a freeholder in the State, and that before the trial he declared his prejudice afiainst the defendant. The district attorney filed a written denial of the allegations made in the motion for new trial, but introduced no evidence in support of said denial. In this

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state of the case, the juror Doss must be held to have been incompetent, and his service upon the jury entitled the defendant to a new trial. *Brackenridge v. State*, 513.

O

OCCUPATION TAX.

1. Under the Acts of March 11, 1881, and April 4, 1881, the appellant was prosecuted for pursuing the occupation of selling liquors in quantities less than a quart, without paying the tax required by law and without license, etc. He excepted to the indictment on the ground that the said Acts of 1881 are violative of the Constitution of the State in two respects; first, because they contain more than one subject, and embrace subjects not expressed in their titles; and, second, because, as a condition precedent to engaging in such business, the said Acts require the tax thereon to be paid in advance for the term of a year, but permit the tax on other occupations to be paid quarterly, and require a license to pursue said business, but permit others to be pursued without a license, and therefore are repugnant to the constitutional requirement of equality and uniformity in taxation. But *held* that neither of these objections to the said Acts of 1881 is tenable, nor are the said Acts repugnant to the Fourteenth Amendment of the Constitution of the United States. See the opinion in extenso for a lucid exposition of the principles and precedents which maintain the constitutionality of the said enactments. *Fahey v. State*, 146.

2. The present Constitution of Texas provides that "No bill (except general appropriation bills, etc.,) shall contain more than one subject, which shall be expressed in its title." *Held* that an Act may, without contravening this inhibition, contain or contemplate more objects than one. *Id.*

3. Section 1 of article 8 of the State Constitution expressly empowers the Legislature to impose occupation taxes, and section 2 of the same article requires that such taxes shall "be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." These provisions do not necessitate equality and uniformity as between different classes of occupations, nor require the imposition upon every class of the same conditions precedent to their lawful pursuit; and therefore the requirement from retail liquor dealers of a license and of prepayment of the tax for a year does not contravene the said constitutional provisions, though these conditions be not imposed upon other occupations. So, also, one county may, without infringing said provisions, levy a larger county tax upon an occupation than is levied on the same occupation by other counties. *Id.*

4. The trial court instructed the jury to convict in case they found that the defendant (within the alleged venue and dates) pursued the occupation of selling spirituous, vinous and malt liquors, in quantities less than a quart, "without having paid the occupation tax of three hundred dollars to the State and one hundred and fifty dollars to the county of Galveston, and the said taxes were then

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OCCUPATION TAX—*continued.*

due and owing and unpaid to the State and county respectively;" and further instructed the jury that the penalty was by a fine of not less than four hundred and fifty dollars, nor more than nine hundred dollars. Appellant assails these instructions because they substitute the phrase "without having paid the tax" in lieu of the phrase "without having obtained a license." *Held* that the substitution was to appellant's advantage, and affords him no cause for complaint. *Id.*

5. It was also objected that the instructions assumed as a fact that the county of Galveston had levied on the appellant's occupation a county tax of one half the tax levied on it by the State. The record, however, shows that the appellant admitted that fact on the trial, and that the State consequently introduced no other proof of it. *Held,* that the objection is not tenable. *Id.*

6. Objection was taken to the penalty as stated in the instructions, viz: a fine of not less than four hundred and fifty dollars nor more than nine hundred dollars. *Held* that the instruction was correct, inasmuch as the State tax was three hundred dollars and the county tax one hundred and fifty dollars, aggregating four hundred and fifty dollars, which was the minimum and the double of which was the maximum of the fine prescribed by the statute *Id.*

7. An employe who follows the occupation of selling inhibited liquors when the tax imposed by law has not been paid is, equally with his principal, amenable to article 110 of the Penal Code. *Davidson v. State,* 262.

8. The minimum punishment for pursuing an occupation taxed by law without having first obtained necessary license, is a fine of not less than the tax imposed upon such occupation. And as the license of a retail liquor dealer can not issue for a shorter period than one year, the minimum punishment for the violation of the said article 110 is a fine in the full amount of one year's tax upon such occupation. The charge of the court so defining the penalty, it was correct. *Id.*

9. Failing to request instructions to supply omissions in the charge of the court, the defendant in a misdemeanor case can not be heard to complain of such omissions, notwithstanding he may have excepted to the same. *Id.*

OFFERING FOR SALE ADULTERATED FOOD.

1 See the statement of the case for an information *held* sufficient to charge the offense of offering adulterated food for sale. *Sanchez v. State,* 14.

2 To support a conviction for offering adulterated food for sale it devolves upon the State to prove not only that the accused offered such food for sale, but that, when he did so, he knew that the said food was adulterated. See the statement of the case for evidence *held* insufficient to support a conviction for offering adulterated food for sale. *Id.*

OFFICIAL MISDEMEANOR.

See NEGLECT OF OFFICIAL DUTY.

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OFFICIAL MISCONDUCT.
See EXTORTION.
PENALTY, 2.

OFFICIAL PECULATION.
In the construction of the statute, the legislative intent, if that intent can be ascertained, must govern even over the literal import of words, and without regard to grammatical rules. Thus construed, article 250 of the Penal Code inhibits any officer of a county, city or town from entering into, on account of himself, any kind of financial transaction with such corporation. The indictment in this case charged the accused with the violation of said article, in that he sold a mule to the county of which he was a county commissioner. *Held*, that such sale constituted a violation of said article, and the indictment was sufficient. *Rigby v. State*, 55.

OWNERSHIP.
See THEFT, 4.

P

PENALTY.
1. Objection was taken to the penalty as stated in the instructions, viz: a fine of not less than four hundred and fifty dollars nor more than nine hundred dollars. *Held* that the instruction was correct, inasmuch as the State tax was three hundred dollars and the county tax one hundred and fifty dollars, aggregating four hundred and fifty dollars, which was the minimum and the double of which was the maximum of the fine prescribed by the statute. *Fahey v State*, 146.
2. Article 3388 of the Revised Statutes provides that "all convictions by a petit jury of any county officers for any felony, or for any misdemeanor involving official misconduct, shall work an immediate removal from office of the officer so convicted, and such judgment of conviction shall in every instance embody within it an order removing such officer." Demanding fees not allowed by law is "official misconduct" within the purview of the statutes of the State. *Brackenridge v. State*, 513.

PERJURY.
1. It is essential in a perjury case not only that the indictment shall allege that the court before which the judicial proceeding in which the perjury is charged to have been committed had jurisdiction of such judicial proceeding, but that fact must be established by the proof. *Wilson v. State*, 47.
2. Under the law of this State an information is insufficient for any purpose unless founded upon a complaint, filed therewith, charging an offense. The indictment in this case charged that the perjury was committed on the trial of a judicial proceeding in the county court "wherein one Bean was duly and legally charged by information," etc. To support the allegation of jurisdiction of the county court, the State

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PERJURY—*continued.*

introduced in evidence the information, but not the complaint. *Held*, that the proof was insufficient. *Id.*

3. To charge the jury, in felony cases, upon the law applicable to the case, whether asked or not, is under our law a duty imposed imperatively upon the trial judge. It is an express provision of our statute that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statements under oath, or upon his own confession in open court." The trial being upon the plea of not guilty, and not upon confession in open court, the omission of the trial court to give in charge to the jury the substance of the above statutory provisions was fundamental error. *Id.*

4. A "credible witness," as used in the statute, means "one who, being competent to give evidence, is worthy of belief." *Id.*

5. Note the approval of Wilson v. The State, *ante*, to the effect that without a supporting affidavit an information is not sufficient evidence of jurisdiction alleged in the indictment, and that the omission of the trial court, on trial for perjury, to give in charge to the jury the substance of article 746 of the Code of Criminal Procedure, is fundamental error. But note that the errors in this respect, committed upon the trial of Wilson's case, were not committed upon the trial of this case. *Smith v. State*, 50.

6. Indictment which conforms to No. 122 of Willson's Criminal Forms is sufficient to charge the offense of perjury. *Id.*

7 The materiality of matter assigned as perjury is a question to be determined by the court, and not by the jury. A special instruction announcing the converse as the rule was properly refused. *Id.*

8. In his concluding argument the counsel for the defense stated to the jury that the State's counsel, in closing the case, would have something to say about why P. and W. and E (all of whom were shown to be indicted for the same offense) were not put on the stand by the defense, and that the reason they were not called to the stand was that, if called, the prosecuting officer would indict them again for perjury. In reference to this matter the State's counsel, in concluding the argument, stated that all of the parties named, except W., who had been convicted, could have been called to testify without danger of indictment if they testified to the truth. *Held*, that the remarks of the State's counsel, being responsive to the argument for the defense, were legitimate. *Id.*

9. The common law rule that an indictment for perjury must allege correctly the day on which the perjury was committed, and that a variance between the time alleged and that proved would be fatal, has been so changed by statute in this State, that the indictment need only allege some time anterior to the presentment of the same, and not so remote as to be barred by the statute of limitations; with which allegation the proof, to be sufficient, must concur. *Lucas v. State*, 322.

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PERJURY—*continued.*

10. The affidavit of a public free school teacher to the voucher for his salary is "required by law," and therefore, if false, is matter assignable for perjury, and not for the distinct offense of false swearing. *O'Bryan v. State*, 339.

11. Charge of the court in a perjury case must instruct the jury upon the provisions of article 746 of the Code of Criminal Procedure. *Miller v. State*, 497.

12. A false statement under oath, to constitute perjury, must have been deliberately and wilfully made, the accused at the time knowing it to be false. A false statement under oath, if made through mistake, is not perjury. *Brookin v. State*, 701.

13. When previously arraigned for trial for cattle theft, the accused applied, under oath, for a continuance for want of two absent witnesses, whose absence, he averred in his application, was not by his procurement or consent,—and this averment in the said application is the perjury assigned in this case. On this trial it was proved that, several days before the case for cattle theft was called, the defendant told the said witnesses that he would not need them on his trial; that they need not attend, and they were excused by him from attending that trial in his behalf. To meet this evidence the defendant offered to prove by the witness B. that, after he had excused the said witnesses, and before the theft case was called for trial, he directed the said B. to countermand his agreement excusing them from attending and testifying in his behalf on the trial, and to require them to be present as witnesses in his behalf; that, being himself confined in jail, he could not attend to the matter himself, and B. promised but failed to do as directed by him. This proof was excluded upon objection of the State. *Held*, error, inasmuch as it tended to show, and, if true, did show, a false statement under oath made by mistake. *Id.*

14. Charge of the court on a trial for perjury is fundamentally erroneous if it fails to instruct the jury that a conviction for perjury can not be had except upon the testimony of at least two credible witnesses, or of one credible witness strongly corroborated by other evidence, or upon the accused's confession in open court, as to the falsity of the statements under oath. *Id.*

PLAYING CARDS, ETC.

1. A "gin" is not one of the places or houses designated by the statute as a "public place." To charge the offense of playing cards in a public place, "to wit, a gin," the information should have charged the facts which constituted the gin a public place. *Dailey v. State*, 569.

2. The information charged that the accused played the cards in Starkey's gin. The proof was that he played cards in a fence corner, in a pasture and in a room near Starkey's gin, but not at the gin. *Held*, insufficient to support a conviction. *Id.*

3. The information charges that the accused, on March 5, 1888, did play a game of cards in a certain out house, "said out house being then and there a place where people did then and there resort."

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PLAYING CARDS, ETC.—*continued.*

To authorize a conviction under this information it was necessary for the State to show by the evidence that the offense was committed prior to the presentation of the information, and that at the very time it was committed the said out house was a place where people resorted. See the opinion for the substance of evidence *held* insufficient to support a conviction for playing cards in a place of public resort. *Lynn v. State*, 590.

PLEADING.

1. Indictment to charge the fraudulent sale or disposition of mortgaged property must allege the name of the person to whom the same was sold or disposed of, or, if such be the fact, that the name of such person was to the grand jurors unknown. *Alexander v. State*, 94.

2. The second count of the indictment (being the count upon which this conviction was had) charges that certain persons, to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder one Ellick Brown, and that defendant, prior to the commission of said murder by said unknown persons, did unlawfully, wilfully and of his malice aforethought, advise, command and encourage said unknown persons to commit said murder said defendant not being present at the commission of said murder by said unknown persons. It was objected to the indictment that it neither named nor gave a description of the unknown persons who committed the murder of Brown. *Held*, that the objection is not sound, and the indictment is sufficient, its purpose and effect not being to charge the unknown persons as the "accused" in this case, but to carge the defendant as an accomplice to the murder of Brown. *Dugger v. State*, 95.

3. In a criminal action for malicious prosecution under article 273 of the Penal Code, it is not essential that the information shall allege that the prosecution against the injured party had ended before the information was presented. See the opinion for an information *held* sufficient to charge such a malicious prosecution as constitutes the offense defined in said article 273. *Dempsey v. State*, 269.

4. Indictment for burglary charged that the house was entered with the intent to commit theft, but fails to charge that the entry was made with the fraudulent intent to take the property from the possession of the owner; and the allegation of theft fails to charge that the property was taken from the *possession* of the owner. *Held* insufficient to charge the offense. *O'Brien v. State*, 448.

5. Indictment, to be sufficient to charge the offense of fraudulently disposing of mortgaged property, with intent to defraud, etc., must allege the name of the person to whom the mortgaged property was disposed or sold, or that the name of sech person was to the grand jury unknown. *Armstrong v. State*, 462.

6. Indictment or information is not bad for duplicity because it contains several counts charging different misdemeanors. *Alexander v. State*, 533.

7. It is not required that each and every count in an indictment

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PLEADING—*continued.*

shall conclude with the words "against the peace and dignity of the State," it being sufficient if the instrument as a whole so concludes *Id.*

8. Information is insufficient to charge an offense unless it concludes with the words: "against the peace and dignity of the State." The complaint, however, being a good one and sufficient to sustain an information, the cause is not dismissed, but is remanded in order that a valid information may be filed upon the complaint. *Wood v. State*, 538.

POSSESSION OF RECENTLY STOLEN PROPERTY.

See EVIDENCE, 16, 17.

THEFT, 28.

1. See the opinion in extenso for a charge of the court upon the question of the possession of recently stolen property, etc., *held* correct and responsive to the proof. *Clark v. State*, 405.

2. The rule has been announced in repeated decisions of this court that the possession of recently stolen property is not of itself proof positive of theft, but that the proof of such possession, "however recent, and whether explained or not, is merely a fact or circumstance to be considered by the jury, in connection with all the other facts submitted to them, in determining the guilt of the possessor." The same rule requires that when the accused, upon being first challenged, offers an explanation of his possession, it devolves upon the court to instruct the jury as to the effect of such explanation—that is, if the explanation is reasonable, it will prevail as against the naked possession, unless rebutted by the State. The presumption of guilt which attends possession of stolen property is a presumption of fact for the jury, and not of law. In this case the charge of the court, otherwise correct, instructed the jury that the "possession of recently stolen property is presumptive evidence of guilt." *Held* error. *Lee v. State*, 475.

PRACTICE.

See ALIBI, 1.
CHARGE OF THE COURT, 30–32, 55.
CONTINUANCE, 5.
EVIDENCE, 2, 4, 21, 47, 48.
INDICTMENT, 2, 21, 22.
INFORMATION, 2.
NEWLY DISCOVERED EVIDENCE, 1.
NEW TRIAL, 1, 4, 7.
SLANDER.
SPECIAL PLEA, 1.
SWINDLING.
THEFT, 1, 2, 10.
VARIANCE, 1.
VENUE, 2.
VERDICT, 4.

1. The statute under which one of plural defendants, whether jointly or separately indicted, by filing his affidavit to the effect that he verily believes there is no evidence against his co-defendant, and that the testimony of his co-defendant is material to his own defense, may require that his co-defendant be first tried, can not, independent of other sufficient showing, be held to operate a continuance of his case to secure the testimony of his co-defendant. When

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arraigned in the district court of Shackelford county, to which the venue had been changed from Stephens county, the defendant in this case filed an affidavit setting forth that Jane Stouard was charged by separate indictment with the same offense; that the indictment against Jane Stouard was still pending in the district court of Stephens county; that the testimony of the said Jane Stouard was material to his defense, and that he verily believed there was not sufficient evidence to convict the said Jane Stouard; upon which affidavit he prayed the court to order that the said Jane Stouard be first tried, and that his trial be continued in order to enable him to secure the testimony of said Jane Stouard, if acquitted. *Held*, that the court did not err in refusing to continue the case to await the trial of the co-defendant. *Stouard v. State*, 1.

2. The application for continuance recited also the absence of two material witnesses. Overruling the same for the want of diligence, the trial judge explained that, although confined in the same jail with one of the absent witnesses for months, the accused had taken no steps to secure the service of process upon him; and that, although, as shown by a previous application for continuance, the defendant knew that the other witness was an incurable invalid, and unlikely ever to be able to leave his bed, he had taken no steps to secure his deposition. *Held* that the ruling was correct. *Id.*

3. It is an established rule of practice in this State that, upon the trial of an offense which comprehends different degrees it becomes the imperative duty of the trial court to instruct the jury upon the law applicable to every degree or grade of offense indicated by the evidence, however feeble such evidence may be; that, if there be a doubt as to which of two or more grades of the offense the accused may be guilty, the law as to all of such grades should be charged, and that the trial court should omit to charge the law of any particular grade only when it is to no extent whatever raised by the evidence. See the statement of the case for evidence adduced on the trial for murder, which, though sufficient to establish the express malice essential to constitute murder of the first degree, is not of such character as to absolutely preclude the jury from finding therefrom a killing upon implied malice, and, therefore, murder in the second degree; wherefore the omission of the trial court to instruct the jury upon the law of murder of the second degree was error. *Blocker v. State*, 16.

4. The accused, being on trial for murder, contends that, under the law of this State, it is the duty of the trial judge, in murder cases, without regard to the evidence adduced, to instruct the jury as to the law of murder of the second degree. But *held* that, notwithstanding the apparent plausible construction of the statutes upon which the proposition is maintained, the doctrine obtains in this State that the trial court may decline to submit to the jury the issue of murder of the second degree when the evidence wholly fails to present that issue. See the opinion in extenso upon the question, and note the suggestion relative to the charge in trials for murder. *Id.*

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5. Note the approval of Wilson v. The State, *ante*, to the effect that without a supporting affidavit an information is not sufficient evidence of jurisdiction alleged in the indictment, and that the omission of the trial court, on trial for perjury, to give in charge to the jury the substance of article 746 of the Code of Criminal Procedure is fundamental error. But note that the errors in this respect, committed upon the trial of Wilson's case, were not committed upon the trial of this case. *Smith v. State*, 50.

6. Indictment which conforms to No. 122 of Willson's Criminal Forms is sufficient to charge the offense of perjury. *Id.*

7. It is a rule of practice in this State that special instructions, whether given or refused by the trial judge, must be authenticated by his signature, and if the record fails to show that such instructions were refused, the Appellate Court will presume that they were given. *Id.*

8. Special instructions are properly refused when it appears that, to the extent they were correct, they were embodied in the general charge. *Id.*

9. The materiality of matter assigned as perjury is a question to be determined by the court, and not by the jury. A special instruction announcing the converse as the rule was properly refused. *Id.*

10. In his concluding argument the counsel for the defense stated to the jury that the State's counsel, in closing the case, would have something to say about why P. and W. and E. (all of whom were shown to be indicted for the same offense) were not put on the stand by the defense, and that the reason they were not called to the stand was that, if called, the prosecuting officer would indict them again for perjury. In reference to this matter the State's counsel, in concluding the argument, stated that all of the parties named except W., who had been convicted, could have been called to testify without danger of indictment if they testified to the truth. *Held*, that the remarks of the State's counsel, being responsive to the argument for the defense, were legitimate. *Id.*

11. Appeal bond or recognizance for appeal must be entered into at the trial term, and can not be amended after an appeal has been perfected. *Koritz v. State*, 53.

12. No such offense as malicious mischief is known, *per se*, to the law of this State, and an appeal from a conviction for unlawfully breaking and pulling down and injuring the fence of another must be dismissed when the recognizance for appeal describes the offense as malicious mischief. *Id.*

13. As a necessary predicate for the admission in evidence of dying declarations, it must be established that the declarant, when he made them, was under the sense of impending death, and was sane. Consciousness of approaching death is provable, not merely by the solemn protestations of the dying person, but by any circumstance which sufficiently shows that when he made the declarations he was under the sense of impending death. See the opinion and the statement of the

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case for evidence *held* sufficient to establish the necessary predicate for the proof of dying declarations. *Miller v. State*, 63.

14. The defendant having introduced evidence of threats against his life, uttered by the deceased, a short time before the homicide, the State, over defendant's objection, was permitted to prove that, about a year before the homicide, the defendant told a witness that the "threats of John Collier (deceased) did not amount to any more than those of an old woman." *Held* that objection to this proof was properly overruled. *Id.*

15 Special counsel for the State, in the concluding argument for the prosecution, stated to the jury that "the defense of an insult to a man's wife is set up in two-thirds of the cases in this county;" that, "when before the grand jury the witness Rose made no such statement as that he picked a pistol up from the ground;" that "he knew John Collier well, and that he was an honest and truthful man," and that "John Collier left a wife and a lot of orphan children, and in their behalf you should punish the defendant;" with reference to all of which statements the trial judge instructed the jury that they were not to be considered, as they rested upon no evidence in the case. *Held* that the instruction of the trial court was sufficient to countervail any prejudicial tendency of the said statements. *Id.*

16. Objection that the trial court charged the jury abstractly upon the issue of manslaughter can not be entertained, inasmuch as it was not interposed when the charge was given, and no probable injury to the accused is shown. See the opinion for a charge upon homicide in defense of the person against an unlawful attack, and the statement of the case for a charge upon adequate cause, *held* sufficient, under the facts of the case. And note that the evidence does not call for a charge upon "cooling time," nor upon self defense, wherefore the trial court did not err in omitting to charge upon "cooling time" nor refusing the special charge as to self defense. *Id.*

17. Even if the absent testimony set out in an application for continuance be both admissible and probably true, it will not, if immaterial, require the award of a new trialbecause of the refusal of the continuance. *Peace v. State*, 83.

18. Bill of exception reserved to the charge of the court, if too general or indefinite to point out specific objection, will not be considered on appeal; and, in the absence of a proper bill of exception, this court will examine the charge of the court below only with reference to fundamental errors or such as, under all the circumstances of the case, are calculated to prejudice the rights of the accused *Id.*

19. The charge of the court in this case should, more explicitly than it did, have instructed the jury that, to convict, they must find that the defendant was not present at the commission of the murder, and that the murder was committed by a person or persons who had been advised, commanded or encouraged by the defendant to commit it. *Dugger v. State*, 95.

20. If the proof tends to raise the question whether or not a State's

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witness is an accomplice in the offense on trial, can the trial court, in any state of case, refuse to submit to the jury the question of accomplice *vel non*, together with proper instructions upon the corroboration of accomplice testimony? If so, it must not only be because the proof that the witness is an accomplice is meagre, but because the other proof in the case tends strongly to show that he is not. The proof in this case fairly mooting the complicity of the two State's witnesses, the trial court erred in refusing to instruct the jury upon the law of accomplice testimony. *Hines v. State*, 104.

21. Bill of exception to the admission of evidence must disclose the ground of objection; otherwise it is not entitled to be considered on appeal. *Hughes v. State*, 127.

22. The husband or wife is competent to testify for the other in a criminal prosecution, but not for the State, unless the prosecution be for an offense committed by the one against the other. This rule is not relaxed by a mere separation of the spouses without a legal severance of the marriage relation. *Johnson v. State*, 135.

23. It is not essential to the sufficiency of an indictment to charge the offense of betting at a game played with dice, that it shall allege that the accused played the game with another or bet with another person. *Day v. State*, 143.

24. To bet at any game played with dice, by whatever name the game be known, is an offense under the law of this State. And each separate act of betting at such a game constitutes a distinct offense. The consecutive throwing of dice from nightfall until day break does not constitute a continuous game, and the consecutive betting on the different throws does not constitute a continuous offense. *Id.*

25. A witness, to be incompetent to testify in behalf of a defendant upon the ground that he was under indictment for the same offense, must appear to have been indicted for participation in the very same criminal act for which the defendant is being tried. It will not suffice to disqualify him that he is indicted for a similar offense. The defense in this case offered a witness by whom to prove an alibi. The witness was rejected, upon the State's motion, upon the ground that he was charged by a separate indictment with the same offense. The onus of establishing incompetency by showing that the indictment against the witness covered the same criminal act for which the defendant was on trial rested on the State; and, the State failing to establish that fact in this case, the presumption obtained in favor of the competency of the witness, and the ruling of the court was error. *Id.*

26. The trial court instructed the jury to convict in case they found that the defendant (within the alleged venue and dates) pursued the occupation of selling spirituous, vinous and malt liquors, in quantities less than a quart, "without having paid the occupation tax of three hundred dollars to the State and one hundred and fifty dollars to the county of Galveston, and the said taxes were then due and owing and unpaid to the State and county respectively;" and further instructed the jury that the penalty was by a fine of not less

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than four hundred and fifty dollars, nor more than nine hundred dollars. Appellant assails these instructions because they substitute the phrase "without having paid the tax" in lieu of the phrase "without having obtained a license." *Held*, that the substitution was to appellant's advantage, and affords him no cause for complaint. *Fahey v. State*, 146.

27. It was also objected that the instructions assumed as a fact that the county of Galveston had levied on the appellant's occupation a county tax of one-half the tax levied on it by the State. The record, however, shows that the appellant admitted that fact on the trial, and that the State consequently introduced no other proof of it. *Held*, that the objection is not tenable. *Id.*

28. The proof on a trial for rape was in direct conflict as to the identity of the defendant as the person who committed the offense. A defense witness having testified to facts tending to establish in favor of the defendant a case of mistaken identity, the State, over objection of defendant, was permitted to interrogate the witness as to whether or not, subsequent to the alleged offense, he received from the defendant a letter confessing his guilt, and making a statement concerning, and asking information about, the commission of the offense. In permitting this manner of examination the court erred, because, first, if, as manifest, the purpose of the State was to prove that the witness received from defendant a letter written by him and confessing his guilt, it should first have summoned the witness with a *subpœna duces tecum* to produce the letter in court. Failing then to produce the letter, the witness might be examined to prove the reception by him of such a letter, and that to his knowledge it was written by defendant. But then the contents of the letter could not be proved by the witness without proof of the loss or destruction of the same. Second, if the object of the State was to impeach the witness, then the fact whether or not he had received a letter from the defendant was the only fact about which the predicate was allowable, and, the witness having answered that question in the negative, the limit of the investigation was reached, under the rule that "when a witness is cross examined on a matter collateral to the issue, his answer can not be subsequently contradicted by the party putting the question." This rule was further violated in this case by permitting the State to contradict the witness by another witness, as to the letter. *Johnson v. State*, 163.

29. The trial court charged the jury as follows: "Penetration is necessary to constitute the offense, but penetration only is necessary to constitute the offense." *Held*, abstractly correct, but insufficient, because, in addition to penetration, it is essential in a rape case to show want of the woman's consent, and that the act was accomplished by force, threats or fraud. *Id.*

30. The court charged further as follows: "It is not sufficient, to secure a conviction, for the State to make out a prima facie case, but the guilt of the defendant must be shown beyond a reasonable doubt; and the failure or inability of the defendant to show his innocence

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does not lend any additional probative force to the incriminative facts, if any, shown by the State, or raise any presumption of guilt against the defendant." This charge, though abstractly correct, was calculated to lead the jury to believe that, in the opinion of the court, the defense had failed to show innocence. A reasonable doubt of guilt, independent of exculpatory proof, entitles an accused to an acquittal. *Id.*

31. The court further instructed the jury that "the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and, if upon the whole evidence you have a reasonable doubt of his guilt, you must acquit him, and not resolve the doubt by a mitigation of the punishment." This charge is objectionable in that the concluding clause may have induced the jury to inflict the greater penalty instead of the milder one provided by the statutes. Note the suggestion that in charging the reasonable doubt the trial court should follow the language of the statute. *Id.*

32. In this case the trial court charged upon an issue depending upon the evidence. The defendant excepted to the charge because it was unwarranted by any evidence in the case. In his authentication of the bill of exceptions, the trial judge recites that there was no such evidence adduced on the trial, and that the evidence referred to in the charge was evidence adduced on the trial of another case. The statement of facts does contain evidence which would warrant the charge, but, as the bill of exceptions controls, the charge must be held erroneous as unauthorized by any evidence on the trial. *Briscoe v. State*, 193.

33 The State's witness Holman testified on the trial of the accused as an accomplice to murder, to the acts, declarations and statements of one Harris, and to a conversation between him, the witness, the said Harris, and the alleged principal, to all of which the accused objected upon the ground that he was not present at any of the times testified about, and that it had not been shown that a conspiracy to commit murder existed between him and the said parties. *Held* that this proof in this case was clearly hearsay, and was inadmissible except upon the predicate of the existence of such a conspiracy. Whether the proof sufficiently established the predicate was, primarily, a question to be determined by the court; but, the evidence clearly presenting the sufficiency of the predicate as an issue in the case, the trial court erred in failing to submit that issue to the jury, with instructions to disregard the evidence admitted unless the predicate was established by other proof. In the same connection the court should have instructed the jury that a conspiracy can not be established by the acts or declarations of a co-conspirator, made after the consummation of the offense and in the absence of the defendant. See the opinion for a special charge on the subject, which, being correct and demanded by the proof, was erroneously refused. *Crook v. State*, 198.

34. Expressions of the trial judge, in the presence of the jury, with reference to the cogency of the evidence, if prejudicial to the defendant, and exception is promptly reserved, constitute cause for reversal.

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Pending the discussion in the presence of the jury, of the admissibility in evidence of the declarations of an alleged co-conspirator, the trial judge interjected questions to counsel which clearly intimated that, in his opinion, a conspiracy had been sufficiently established to admit the evidence; to which action of the judge the defendant promptly excepted. *Held*, material error. The jury should have been retired pending the discussion and the ruling on the question. *Id.*

35. A prosecuting witness having testified to certain inculpatory facts, the defense sought to impeach him by proving that he had made statements contradictor y his testimony on the trial. There. upon, over objection by the defense, the State was permitted to introduce evidence in support of the good general reputation of the witness for truth and veracity. *Held*, that the action of the court was correct, especially in view of the showing that the impugned witness was a stranger in the county of the trial. *Id.*

36. As a predicate for the introduction in evidence of the written testimony of one T., as delivered at the examining trial, it was proved that the said T. resided in the Indian Territory at the time of the examining trial and at the time of this trial. *Held* that the predicate was sufficiently established. *Id.*

37. The defense offered to prove by the witness N. the statement made to him by and one D. to the effect that the gun with which it was claimed by the State the killing was done was found by D. at a certain place, which proof, upon objection by the State, was excluded as hearsay. *Held* that the ruling was correct. *Id.*

38. Article 205 of the Code of Criminal Procedure provides that "prosecutions for offenses committed wholly or in part without, and made punishable by law within, this State, may be commenced and carried on in any county in which the offender is found." The mortgage in this case was executed in K. county, where the defendant had possession of the property. He removed the property from said county, and, while en route to Louisiana, was arrested in H. county. Escaping thence, he went into Louisiana with the property. The contention of the defendant is that H., and not K., county, was the county of the venue. But, *held*, that the offense on trial being one that comes within the purview of article 205 of the Code Criminal Procedure, it was properly prosecuted in K. county. *Williams v. State*, 258.

39. An employe who follows the occupation of selling inhibited liquors when the tax imposed by law has not been paid is, equally with his principal, amenable to article 110 of the Penal Code. *Davidson v. State*, 262.

40. The minimum punishment for pursuing an occupation taxed by law without having first obtained necessary license, is a fine of not less than the tax imposed upon such occupation. And as the license of a retail liquor dealer can not issue for a shorter period than one year, the minimum punishment for the violation of the said article 110 is a fine in the full amount of one year's tax upon such occupation. The charge of the court so defining the penalty, it was correct. *Id.*

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41. Failing to request instructions to supply omissions in the charge of the court, the defendant in a misdemeanor case can not be heard to complain of such omissions, notwithstanding he may have excepted to the same. *Id.*

42. On the trial, the court below permitted the justice of the peace before whom the alleged malicious prosecution was had to testify that he discharged the alleged injured party, because, in his opinion, the evidence did not support the charge brought against him. *Held*, error. *Dempsey v. State*, 269.

43. Subdivision 2 of article 730 of the Code of Criminal Procedure denounces as incompetent to testify in criminal actions, "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath." *Hawkins v. State*, 273.

44. There is no precise age under which a child is deemed incompetent to testify, but when under fourteen years of age competency is determinable by an examination, and the action of the trial court thereon will not be revised in the absence of a showing that its discretion was abused, and unless an abuse of discretion is apparent. The objections to the witness in this case are solely as to his youth and ignorance. His examination disclosed that while he inadequately, if at all, understood the obligation of an oath, he knew that it was right to speak the truth and wrong to speak falsely. He was held competent and testified, and his narrative of the facts within his knowledge was not merely clear, concise, positive and intelligent, but was corroborated by physical facts discovered and detailed by other witnesses. *Held*, that in holding the witness competent, the trial court did not abuse its discretion. *Id.*

45. The wife of the deceased, who had been previously tried for complicity in the same offense, and had been acquitted, testified for the defense on this trial, and, to impeach her testimony, the State was permitted to prove contradictory statements previously made by her. The objection urged to this by the defense was that she was under arrest at the time she made the said contradictory statements, and that the evidence was hearsay. *Held*, that the objection was properly overruled. Articles 749 and 750 of the Code of Criminal Procedure, excluding confessions made in duress, apply only to the confessions or admissions of *a defendant who is on trial*, made when under arrest, and they can not be extended to parties not on trial. Whilst hearsay, so far as the defendant was concerned, the said contradictory statements were admissible to impeach the witness, to which sole purpose they were properly limited by the charge of the court. *Id.*

46. In support of the motion for new trial, the defense filed the affidavit of a third person to the effect that after the trial of Sarah Washington, for the same offense, and before the trial of the defendant, one of the jurors who tried the defendant, said that the said Sarah Washington should have been awarded the death penalty,

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and that the testimony on her trial and that on the trial of defendant was essentially the same. The counter affidavit of the impugned juror affirms that he had no recollection of making the statement imputed to him, and that, if he made it, he made it in jest, and that he tried the defendant without bias or prejudice, and solely upon the evidence adduced and the law given in charge. *Held*, that the motion for new trial was properly overruled. *Id.*

47. The common law rule that an indictment for perjury must allege correctly the day on which the perjury was committed, and that a variance between the time alleged and that proved would be fatal, has been so changed by statute in this State that the indictment need only allege some time anterior to the presentment of the same, and not so remote as to be barred by the statute of limitations; with which allegation the proof, to be sufficient, must concur. *Lucas v. State*, 322.

48. When it is shown that a verdict of guilty was probably influenced by the statement of a juror to his colleagues assailing the credibility of a witness for the defendant, a new trial should be granted. *Id.*

49. A *particeps criminis* who, for the purpose of securing exemption from prosecution, agrees to testify in behalf of the State against his accomplices in crime, but who subsequently violates his agreement by refusing to testify in good faith fairly and fully to facts wihtin his knowledge, can not claim the benefit of such agreement, and may be prosecuted and convicted, regardless thereof. *Neeley v. State*, 324.

50. Under the common law, the confession made by the accused under his agreement to become State's evidence, can be used against him in a prosecution instituted because of his violation of his agreement. But, as heretofore held by this court, such confession, to be admissible, must have been voluntarily and freely made, uninfluenced by persuasion or compulsion; not induced by any promise creating hope of benefit, nor by threats creating fear of punishment. A promise, such as will render the confession inadmissible, must be positive, must be made or sanctioned by a person in authority, and must be of such character as would be likely to influence the party to speak untruthfully. A confession induced by the mere fear of legal punishment is not thereby rendered inadmissible. *Id.*

51. The defendant in this case, being at large and not in custody, agreed with the county attorney to testify for the State against his accomplices in this and other thefts, upon the consideration of immunity to himself from prosecution for such offenses. He, however, repudiated the agreement, although, when he entered into it he made a confession which, upon his subsequent trial, was introduced in evidence against him. The proof shows that such confession was not voluntary, and that it was made upon the promise of exemption from prosecution. *Held* that, having violated his agreement to testify for the State, the accused was properly placed upon trial for the offense charged against him, and that the confession, being an involuntary one, was properly excluded upon that ground. *Id.*

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PRACTICE—*continued.*

52. But the trial court admitted the said confession under the provisions of article 750 of the Code of Criminal Procedure, which legalizes a confession in duress as evidence, if it states facts afterwards found to be true, and which conduce to establish the guilt of the accused. *Held* that, if verified in the manner prescribed by said article 750, such confession would be admissible. But in this case there is a total absence of verifying proof; wherefore, the trial court erred in admitting the confession in evidence. *Id.*

53. Being convicted and fined in the recorder's court of Galveston city for a violation of a penal ordinance of the city, the defendant appealed to the criminal district court of Galveston county, by which court his appeal was dismissed on the ground that it had no jurisdiction of such municipal offenses, inasmuch as no right of appeal in such cases was conferred by the special charter of Galveston city, nor by the laws of the State, and because the offense was not against the laws of the State nor prosecuted in the name of "The State of Texas." *Held* that the appeal was erroneously dismissed. See the opinion in extenso for a collocation and construction of the various statutory provisions relevant to the question. *Bautsch v. State*, 342.

54. In all criminal cases tried before mayors and recorders of incorporated cities, the general policy and intent of the statutes of Texas secure to defendants a right of appeal commensurate with that from convictions in justices' courts. The fact that the special charter of a city wholly ignores such right of appeal from convictions for violation of the municipal ordinances can not frustrate the right of appeal from such convictions, notwithstanding the municipal offense consists in an act which is not penal under the general laws of the State. *Id.*

55. All prosecutions for State offenses must be carried on in the name of "The State of Texas," but an incorporated city may ordain that violations of its penal ordinances may be prosecuted in its municipal name. (Ex parte Boland, 11 Texas Ct. App., 159, approved on this subject.) *Id.*

56. The State introduced a witness who testified to a confession made by the accused, and subsequently introduced witnesses to support the reputation for truth and veracity of the witness by whom the confession was proved. Those witnesses testified that for several years preceding the removal of the said witness (about eighteen months before the trial) they lived in the same neighborhood with him. The defense objected that this evidence did not establish the necessary predicate for the supporting testimony. But *held* that the predicate was sufficient. *Thurmond v. State*, 347.

57. It is only under extraordinary or peculiar circumstances that it is proper for the trial court to instruct the jury as to the law governing impeaching testimony, and the failureof the court to do so in this case was not error. *Id.*

58. A witness for the defense testified that he saw the killing; that one Owens and not defendant shot and killed the deceased, and

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PRACTICE—*continued*.

that the defendant was not present at the time of the killing. The State produced several witnesses who testified that the reputation of the said defense witness for truth and veracity was infamous. To support the credibility of its said witness, the defense offered to prove that he testified to the same facts on previous trials involving the same subject matter. *Held* that the rejection of the said proposed proof was correct. *Id.*

59. A fugitive from justice, while fleeing the country, is not "a person traveling," within the exception of the statute forbidding the carrying of a pistol. *Shelton v. State*, 443.

60. Proof of the venue as alleged is essential to a legal conviction for crime. *Id.*

PRACTICE IN THE COURT OF APPEALS.

1. In its preliminary statement to the jury the charge of the court designates the offense on trial as "false swearing," but subsequently designates it as perjury—the offense charged in the indictment. The verdict was general, and found the defendant "guilty," and assessed his penalty at five years in the penitentiary, the minimum penalty for perjury, and the maximum penalty for false swearing. The judgment of the court on the verdict declares the defendant "guilty of false swearing as found by the jury," but the final judgment and sentence declare that he has been "adjudged guilty of perjury." The State moves this court to reform the judgment and sentence so as to conform them to the verdict, maintaining that, as the verdict is general, it responds to the indictment, which charges perjury. But *held* that though this court, in cases wherein the verdict is certain, will exercise its power to conform the judgment or sentence, or both, thereto, it will not do so in cases wherein, as in this case, there is any uncertainty about the import of the verdict. *O'Bryan v. State*, 339.

2. The appellate court, in determining the question whether injury or probable injury resulted to the accused from the giving of an erroneous, or the omission of a necessary, instruction, must consider the charge in its entirety and as applied to the evidence embodied in the statement of facts. *McCoy v. State*, 415.

PREDICATE.

See EVIDENCE, 5.
MURDER, 8.
PRACTICE, 56.

1. The State introduced a witness who testified to a confession made by the accused, and subsequently introduced witnesses to support the reputation for truth and veracity of the witness by whom the confession was proved. Those witnesses testified that for several years preceding the removal of the said witness (about eighteen months before the trial) they lived in the same neighborhood with him. The defense objected that this evidence did not establish the necessary predicate for the supporting testimony. But *held* that the predicate was sufficient. *Thurmond v. State*, 347.

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PREDICATE—*continued.*

2. Note evidence held to establish the predicate for the proof of dying declarations. *Cahn v. State*, 709.

PRESUMPTIONS.

1. If the assault is voluntary, is committed with deliberate design, and with an instrument capable of producing death, and there are no extenuating circumstances, it is an assault with intent to murder. And "whenever it appears upon a trial for assault with intent to murder that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent." See the statement of the case for evidence *held* sufficient to support a conviction for assault with intent to murder. *Trevinio v. State*, 372.

2. The rule is statutory that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the forbidden act." And it is elementary that "a man is always presumed to intend that which is the necessary or even probable consequence of his acts, unless the contrary appears." *Wood v. State*, 393.

PRESUMPTION OF INNOCENCE.

See CHARGE OF THE COURT, 16.

PRINCIPAL OFFENDERS.

See ACCESSORY, 1.

1. In order to authorize the conviction of an accused, as an accomplice, it devolves upon the State to establish the guilt of the principa- of the offense charged against him; and, to establish that specific issue (but not that the accused is an accomplice), any evidence is admissible that would be competent against the principal if on trial. Under this rule the trial court did not err in admitting proof of the confession of the principal; and, in limiting the purpose of such proof to the issue of the principal's guilt, the charge of the court was correct. *Crook v. State*, 198.

2. The indictment in this case charged the appellant as a principal in the theft of a mare, but the evidence wholly fails to connect him in any manner with the original taking of the said mare. *Held*, that such proof is insufficient to support a conviction for theft. *Knowles v. State*, 503.

3. The charge of the court defining principals was abstractly correct, but it failed to apply the law to the facts developed on the trial. To supply this omission the defendant requested the court to instruct the jury that, "in order to convict the defendant, they must find from the evidence that the defendant was, as a principal, as hereinbefore defined, concerned in the original taking of the mare; and if they find from the evidence that one Jeff Griffin first took possession of the mare alleged to be stolen, and delivered the same or sold the same, for himself or for one J. J. Elkins, to defendant, then they should acquit the defendant although they should be-

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PRINCIPAL OFFENDERS—*continued.*

lieve that the original taking of said animal by Griffin was fraudulent and that defendant knew it was fraudulent." *Held*, that the refusal to give such instruction, under the proof in this case, was error. *Id.*

4. In its motion for rehearing, the State contends that the complicity of the defendant in the offense charged is shown by the testimony of the witness W., to the effect that defendant told him that "all the connection Griffin had with the mare was this: that he, defendant, sent said Griffin to get the mare for him and to bring her to him"—the effect of which would be to constitute G., an innocent agent acting by command of the defendant, and the defendant by reason thereof (all other elements of theft existing) the sole principal offender. *Held*, that if said testimony of W. imports such a case, then the charge of the court was fatally erroneous in not submitting that phase to the jury; wherefore rehearing is refused. *Id.*

PRIVILEGE OF COUNSEL.

See CHARGE OF THE COURT, 7.

1. In his concluding argument the counsel for the defense stated to the jury that the State's counsel, in closing the case, would have something to say about why P. and W. and E. (all of whom were shown to be indicted for the same offense) were not put on the stand by the defense, and that the reason they were not called to the stand was that, if called, the prosecuting officer would indict them again for perjury. In reference to this matter the State's counsel, in concluding the argument, stated that all of the parties named, except W., who had been convicted, could have been called to testify without danger of indictment if they testified to the truth. *Held*, that the remarks of the State's counsel, being responsive to the argument for the defense, were legitimate. *Smith v. State*, 50.

2. While on the stand the sheriff was asked by the prosecuting attorney if he did not arrest the defendant several years ago for burglary. The defense objected, and the prosecuting attorney remarked, in the hearing of the jury, that he proposed to "prove by the sheriff that defendant was arrested two or three years ago for a burglary committed in Dallas county, at the same time and place as he is now charged with theft." *Held*, that such proof was not competent, and the trial court should so have instructed the jury. *Taylor v. State*, 463.

R

RAPE.

1. The trial court charged the jury as follows: "Penetration is necessary to constitute the offense, but penetration only is necessary to constitute the offense." *Held*, abstractly correct, but insufficient, because, in addition to penetration, it is essential in a rape case to show want of the woman's consent, and that the act was accomplished by force, threats or fraud. *Johnson v. State*, 163.

2. Rape by force, as defined by article 528 of the Penal Code, is

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RAPE—*continued.*

carnal knowledge of a woman, obtained by force, without her consent. "Force," as used in the said article, is such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case (Penal Code, art. 529), and upon a trial for rape by force it devolves upon the trial court to give in charge to the jury such statutory definition of "force." *Brown v. State*, 330.

REASONABLE DOUBT.

CHARGE OF THE COURT, 34, 71.

MURDER, 27.

1. The court charged further as follows: "It is not sufficient, to secure a conviction, for the State to make out a prima facie case, but the guilt of the defendant must be shown beyond a reasonable doubt; and the failure or inability of the defendant to show his innocence does not lend any additional probative force to the incriminative facts, if any, shown by the State, or raise any presumption of guilt against the defendant." This charge, though abstractly correct, was calculated to lead the jury to believe that, in the opinion of the court, the defense had failed to show innocence. A reasonable doubt of guilt, independent of exculpatory proof, entitles an accused to an acquittal. *Johnson v. State*, 163.

2. The court further instructed the jury that "the defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt; and, if upon the whole evidence you have a reasonable doubt of his guilt, you must acquit him, and not resolve the doubt by a mitigation of the punishment." This charge is objectionable in that the concluding clause may have induced the jury to inflict the greater penalty instead of the milder one provided by the statutes. Note the suggestion that in charging the reasonable doubt the trial court should follow the language of the statute. *Id.*

3. The trial court instructed the jury as follows: "The defendant is presumed by the law to be innocent until his guilt is established by competent evidence to the satisfaction of the jury, beyond a reasonable doubt; and if you have on your minds arising from the evidence a reasonable doubt as to the guilt of the defendant, you will find him not guilty." *Held*, sufficient on the doctrine of reasonable doubt, and not obnoxious to the objection that it "requires either the State or the defendant to introduce affirmative evidence of the defendant's innocence;" nor to the further objection that it contravenes the rule that a reasonable doubt may as well arise from a want of evidence as from evidence introduced before a jury. *Zwicker v. State*, 589.

REMOVAL FROM OFFICE.

See PENALTY, 2.

ROBBERY.

1. Indictment for robbery having unnecessarily described the money of which the accused robbed the injured party as "lawful money of

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ROBBERY—*continued.*

the United States of America," it was essential to the validity of the conviction that the kind of money be proved as alleged. The proof in this case, falling short of this requirement, does not support the conviction, and the accused should have been awarded a new trial. *Coffelt v. State*, 608.

2 The indictment alleges that the accused *took* the money from the person of F. The proof shows that the accused and another presented pistols at F., and demanded the money, and that F., in fear of his life or of serious bodily harm, and after being struck, delivered the money. The defense contends that this proof shows a delivery of the money by F. through fear, and, therefore, that there is a fatal variance between the allegation and the proof. But *held* that such a delivery is a *taking* within the purview of the statute defining robbery, and therefore there is no variance. *Id.*

SLANDER.

An information for slander by imputing to a female a want of chastity should allege, at least in substance, the language actually used by the accused, and to that language the proof should be confined. If the meaning of the language as charged be obscure, then the information should allege its meaning; otherwise proof of its meaning is not admissible. The meaning of the language charged by the information in this case is clear and unambiguous, but the language proved is not only variant from that alleged, but is obscure in meaning. The trial court permitted a State's witness to testify that he understood the language used by the accused to correspond in meaning with that charged in the information. *Held*, error. See the opinion for the substance of evidence *held* insufficient to support a conviction for slander because it does not support the allegations in the information. *Berry v. State*, 483.

SODOMY.

The rule that, in rape cases, requires that, if the other proof in the case tends to raise the issue of the female's consent to the carnal act, she becomes so far an accomplice that, in order to warrant a conviction based upon her testimony, she must be corroborated, applies to sodomy cases, and if the evidence tends to show the consent of the prosecuting witness to the act of bestiality committed upon him, he must be corroborated. The proof in this case tends strongly to show the consent of the alleged injured party, who, upon the main issue, was the State's principal witness; and in failing to instruct the jury with regard to the corroboration of an accomplice, the trial court erred. *Medis & Hill v. State*, 194.

"SUBJECT" OF LEGISLATIVE ACTS.

The present Constitution of Texas provides that "No bill (except general appropriation bills, etc.,) shall contain more than one subject

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"SUBJECT" OF LEGISLATIVE ACTS—*continued.*

which shall be expressed in its title." *Held* that an Act may, without contravening this inhibition, contain or contemplate more objects than one. *Fahey v. State*, 146.

SWINDLING.

The swindling was alleged to have been committed by means of a false written instrument and the false declaration of the accused that the names appearing to the same were genuine signatures. The trial court charged the jury in effect that before they could convict they must find that the signatures were on the instrument when it was delivered by the accused, and that he then falsely and fraudulently declared that they were genuine, and so induced the issuance of the draft. *Held*, that the instruction was correct in principle, and applicable to the chargein the indictment and the facts in evidence. But see the statement of the case for evidence upon which it is *held* that the verdict of guilty is contrary to both the instruction and the proof. *Scott v. State*, 264.

THEFT.

See PRINCIPAL OFFENDER, 3.

1. The indictment alleged the name of the owner of the stolen property to be Burris. The proof showed it to be Burrows. The conviction is assailed upon the ground of variance between the ownership as alleged and proved. But *held* that, as the proof further shows that the owner was commonly known as Burris, the variance is not material. *Taylor v. State*, 44.

2. The only inculpatory evidence against the accused was the testimony of two witnesses to the effect that, subsequent to the theft of the property, they saw the same removed from a place of concealment by three parties, one of whom they believed, but were not positive, was the defendant. In antiicpation of this evidence, the defendant applied for a continuance to secure a witness by whom to establish his presence at another place at the time the property was removed from the place of concealment. Being denied the continuance, and convicted, the defendant asked for new trial because of the ruling of the court upon his application for continuance. The new trial was refused upon the ground (as was the continuance) that the proposed alibi did not cover the time of the theft of the property. *Held*, that the action of the trial court was error, not only because of the inherent weakness of the inculpatory proof, but because an alibi is available, not merely to meet the main issue in the case, but any criminative fact relied upon by the State. *Id.*

3. Evidence insufficient to support a conviction for theft. *Reveal v. State*, 57.

4. Ownership, like every other material issue on a trial for theft, must be proved by competent evidence, and if it rests upon the testimony of an accomplice such proof is insufficient unless legally corroborated. *Hanson v. State*, 140.

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THEFT—*continued*.

5. See the statement of the case for the substance of evidence *held* insufficient to support a conviction for theft. *Id.*

6. Evidence insufficient to support a conviction for theft. *McGowan v. State*, 183.

7. Evidence insufficient to support a conviction for theft. *Costillo v. State*, 188.

8. Evidence insufficient to support a conviction for theft. *Ellis v. State*, 190.

9. A conviction based upon the uncorroborated testimony of an accomplice can not stand. See the statement of the case for the substance of evidence *held* insufficient to support a conviction for hog theft. *Smith v. State*, 196.

10. On a trial for horse theft the court admitted hearsay evidence of the contemporaneous theft of a saddle, which evidence, on motion of the defense, was stricken out. Thereafter evidence for the State was admitted identifying as the property of one P. a certain saddle found in the possession of the defendant when he was found in possession of the horse, and the court's charge limited the application of such evidence to the identification of the transaction and the intent of the defendant, etc. *Held*, that, in the absence of proof that the saddle was stolen, the evidence was erroneously admitted, and the charge was erroneous because not based upon legal proof. *Neeley v. State*, 315.

11. This was a prosecution for theft—the indictment charging the theft of three horses in the Cherokee Nation and the bringing of the same into this State. The contention of the defense was that, inasmuch as under an act of the Congress of the United States a white man can not be prosecuted to conviction and punished for a theft committed in the Indian Territory except in the United States courts, he can not be prosecuted to conviction in this State for the theft of property in the Indian Territory, as theft is defined by the law of said Territory, and the bringing of the same into this State; that, as no act can constitute an offense unless a penalty for the commission thereof is provided, and as, under the act of Congress, a white man is not amenable to the law of the Indian Territory for theft, he can not within the purview of that law commit theft, it follows that he can not be prosecuted in this State under articles 798 and 799 of the Penal Code, and therefore the trial court erred in admitting in evidence the statute of the Cherokee Nation defining theft of live stock. *Held*, that the defense can not be maintained. The rule is that if a person commits in another State or Territory acts which, if committed in this State, would be theft, and the said acts constitute theft under the laws of the said State or Territory, and he subsequently brings the stolen property into this State, he can be prosecuted in this State and punished as if the theft had been committed in this State. The statute of the Cherokee Nation, admitted in evidence over objection, excepts no race nor class from its operation and clearly defines the offense of theft with penalty annexed, and it was properly admitted in evidence. *Clark v. State*, 405.

12. The laws of the Cherokee Nation being in evidence, the trial

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THEFT—*continued.*

court instructed the jury that, under said laws, certain acts constituted theft, and left it to the jury to determine from the evidence whether the defendant committed such acts. *Held*, sufficient; and that the court did not err in failing, in its charge to the jury, to define and construe the laws of the said Nation. *Id.*

13. See the opinion in extenso for a charge of the court upon the question of the possession of recently stolen property, etc., *held* correct and responsive to the proof. *Id.*

14. Indictment or information for theft is insufficient if it fail to charge directly that the *taking* was *fraudulent*. *Chance v State*, 441.

15. The *factum probandum* of theft is the taking of the property. If that fact is proved merely as a matter of inference from other facts in evidence, and not by an eye witness, the case rests wholly upon circumstantial evidence; and the failure of the trial court to charge the jury upon the law of circumstantial evidence is material error. *Taylor v. State*, 463.

16. Possession of recently stolen property is not positive evidence of theft, but merely a circumstance tending to prove theft, and is therefore in its character simply circumstantial evidence; and, when alone relied upon by the prosecution, demands of the trial court a charge upon the law of circumstantial evidence. *Id.*

17. If the inculpatory facts in a theft case consist alone of recent possession of stolen property, explained by the accused when first challenged, it imposes upon the court the imperative duty of explaining to the jury in its charge the law applicable to such recent possession and explanation. *Id.*

18. Over the objection of the defendant the State was permitted to introduce in evidence a bill of sale, conveying the alleged stolen horses to the defendant, which bill of sale was found in and taken from the possession of the defendant after his arrest. *Held*, that said bill of sale was properly admitted, in view of the proof showing that it was fabricated by the defendant. It was no objection to said evidence that it was taken from the defendant after his arrest and without authority of law. *Williams v. State*, 466.

19. As a standard of comparison whereby to identify the hand writing in the bill of sale as that of the defendant, the State was permitted to introduce in evidence the authenticated signatures of the defendant to application for continuance, etc., in this case. *Held* correct. *Id.*

20. The bringing by the thief into a county of this State of property stolen in another State constitutes, under our law, theft in the county into which the stolen property is brought; and one who gives aid to the thief in such county, after the stolen property is brought into it, is guilty as an accessory to the theft. *West v. State*, 472.

21. The indictment charged the defendant with the theft in Dallas county, Texas, of a "coupon railroad ticket, which said ticket entitled the holder thereof to one first class passage from Caldwell in Burleson county, Texas, to New York City by way of Purcell,

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THEFT—*continued.*

Kansas City, Quincy, Chicago and Buffalo," the said ticket being the property of the Gulf, Colorado & Santa Fe Railway, and of the value of fifty-seven dollars. The State's witness Cade testified that the value of the ticket, as representing and good for the fare over the said line from Caldwell to New York, was fifty-seven dollars, and that as representing the fare from Dallas to New York, deducting the fare from Caldwell to Dallas, it was fifty-two dollars. The State's witness Hirsch testified that the ticket, as representing the price of a first class fare from Dallas to New York, was worth in Dallas the sum of fifty-five dollars; to all of which testimony the defense objected that the market value of the said ticket in Dallas was the one question at issue. But *held* that, in view of Hirsch's further testimony that he paid the defendant twenty-five dollars for the ticket, the admission of the evidence, if erroneous, constituted immaterial and harmless error. *Cunningham v. State*, 479.

22. The defense offered in evidence a letter addressed by the general passenger agent of the Gulf, Colorado & Santa Fe Railway to the conductors on the lines of the said railway, notifying them of the theft of the said ticket, and directing them to take up the same if offered for fare, cancel the same and return it to the office of the writer. *Held*, that the letter being relevant to no issue in the case, was properly excluded. *Id.*

23. Evidence insufficient to support a conviction for theft. *Green v. State*, 570.

24. Evidence insufficient to support a conviction for theft. *Stone v. State*, 576.

25. Evidence insufficient to support a conviction for theft. *Wilson v. State*, 577.

26. The purpose of the indictment in this case was to charge the theft of a horse from the possession of one Henry Wright, but in drafting the indictment the pleader omitted the word "of" after the word possession. *Held*, that the omission is fatal to the conviction, inasmuch as the omitted word is essential to the accusation. *Riley v. State*, 606.

27. See the opinion in extenso for evidence of a State's witness *held* insufficient to inculpate the said witness as an accomplice to theft. *Id.*

28. See the statement of the case for charges of the court on circumstantial evidence and upon the possession of recently stolen property *held* erroneous, and see the same for evidence *held* insufficient to support a conviction for theft. *Hannah v. State*, 623.

29. On a trial for theft the trial court charged the jury as follows: "When two or more persons conspire together to commit an offense, and each carries out the part agreed to be done by him, and such offense is actually committed, then all parties to such an agreement are equally guilty of such offense; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant fraudulently took the property charged to have been stolen, as given you in charges Nos. 1

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THEFT—*continued.*

and 2, and that defendant and others agreed or conspired, before or after such taking, to prove a purchase or pretended purchase of said cattle, either before or after such taking, this would be no defense to such fraudulent taking." *Held* that, under the proof on the trial (for which see the statement of the case), the charge was not erroneous. *Kegans v. State*, 703.

30. See the opinion for the substance of proposed testimony for the defense *held*, in view of the other proof in the case, to have been erroneously excluded. *Id.*

THREATS.

The defendant having introduced evidence of threats against his life, uttered by the deceased, a short time before the homicide, the State, over defendant's objection, was permitted to prove that, about a year before the homicide, the defendant told a witness that the "threats of John Collier (deceased) did not amount to any more than those of an old woman." *Held* that objection to this proof was properly overruled. *Miller v. State*, 68.

U

UNLAWFULLY BREAKING THE FENCE OF ANOTHER, ETC.

No such offense as malicious mischief is known, *per se*, to the law of this State, and an appeal from a conviction for unlawfully breaking and pulling down and injuring the fence of another must be dismissed when the recognizance for appeal describes the offense as malicious mischief. *Koritz v. State*, 53.

UNLAWFULLY PULLING DOWN FENCE, ETC.

The proof shows that the defendant was the sole owner of a dividing fence between his farm and the farm of one McN.; that, without notice to McN. in writing, he pulled down the said dividing fence, exposing McN.'s growing crops to the depredations of stock; that McN., to protect his crops, again connected his fence to the defendant's fence on the defendant's land, when the defendant again pulled it down. *Held* that, although the sole owner of the dividing fence, the defendant had no right to remove it without having given McN., his agent or attorney, notice in writing of his intention to do so for at least six months prior to so doing. McN., in connecting his fence with that of the defendant, for the purpose of preventing stock depredations on his growing crops, notwithstanding the connecting point was on the defendant's land, was not a trespasser and violated no law. (See Laws of 1887, page 30.) *Jamison v. State*, 442.

UNLAWFULLY SELLING LIQUORS.

See OCCUPATION TAX, 7, 9.

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V

VARIANCE.

See EVIDENCE, 78.
IDEM SONANS, 1.
INDICTMENT, 15.

1. The indictment alleged the name of the owner of the stolen property to be Burris. The prnof showed it to be Burrows. The conviction is assailed upon the ground of variance between the ownership as alleged and proved. But *held* that, as the proof further shows that the owner was commonly known as Burris, the variance is not material. *Taylor v. State*, 44.

2. The complaint alleges that the offense was committed on the sixteenth day of January, 1888; the information that it was committed on the eleventh day of January, 1888. *Held*, that the variance is immaterial. *Shelton v. State*, 443.

3. Verdict reads: "We, the josurys, find the defendant gilty, etc. *Held*, that the words incorrectly spelled constitute no material defect. *Id.*

4. The complaint impleads *John* and the information *Frederick* Juniper. *Held*, that the variance is fatal to the information. *Juniper v. State*, 478.

VERDICT.

See VARIANCE, 3.

1. In misdemeanor cases a jury may be permitted by the court to separate, as provided by article 688 of the Code of Criminal Procedure, but this rule does not authorize the court to reconvene a jury after it has been finally discharged, in order to remedy an informality in a verdict rendered by it, or to return another verdict. *Ellis v. State*, 190.

2. A verdict against joint offenders on a joint trial, to be valid, must assess a separate penalty against each offender. Flynn v. The State, 8 Texas Ct. App., 389, and Matlock et al. v. The State, 25 Id., 716, and Cunningham v. The State, 26 Id., 83, approved. *Medis & Hill v. State*, 194.

3. In its preliminary statement to the jury, the charge of the court designates the offense on trial as "false swearing," but subsequently designates it as perjury, the offense charged in the indictment. The verdict was general, and found the defendant "guilty," and assessed his penalty at five years in the penitentiary, the minimum penalty for perjury and the maximum penalty for false swearing. The judgment of the court on the verdict declares the defendant "guilty of false swearing as found by the jury," but the final judgment and sentence declare that he has been "adjudged guilty of perjury." The State moves this court to reform the judgment and sentence so as to conform them to the verdict, maintaining that, as the verdict is general, it responds to the indictment, which charges perjury. But *held*, that though this court, in cases wherein the verdict is certain, will exercise its power to conform the judgment or sentence, or both, thereto, it

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VERDICT—*continued.*

will not do so in cases wherein, as in this case, there is any uncertainty about the import of the verdict. *O'Bryan v. State*, 339.

4. The statute expressly requires that in convictions for murder the verdict shall specify the degree of murder of which the defendant is found guilty. The failure of the verdict to so specify the degree is cause for reversal. *Zwicker v. State*, 539

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WITNESS.

See EVIDENCE, 14.

1. The husband or wife is competent to testify for the other in a criminal prosecution, but not for the State, unless the prosecution be for an offense committed by the one against the other. This rule is not relaxed by a mere separation of the spouses without a legal severance of the marriage relation. *Johnson v. State*, 135.

2. A person charged, either in the same or another indictment, with participation in the offense on trial, is not competent to testify in behalf of the accused. It appears in this case that the witness proposed by the defense was indicted, by an incorrect name, for the same offense. *Held* that the proposed witness was properly held incompetent. *Anderson et al. v. State*, 177.

3. Subdivision 2 of article 730 of the Code of Criminal Procedure denounces as incompetent to testify in criminal actions, "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath." *Hawkins v. State*, 273.

4. There is no precise age under which a child is deemed incompetent to testify, but when under fourteen years of age competency is determinable by an examination, and the action of the trial court thereon will not be revised in the absence of a showing that its discretion was abused, and unless an abuse of discretion is apparent. The objections to the witness in this case are solely as to his youth and ignorance. His examination disclosed that while he inadequately, if at all, understood the obligation of an oath, he knew that it was right to speak the truth and wrong to speak falsely. He was held competent and testified, and his narrative of the facts within his knowledge was not merely clear, concise, positive and intelligent, but was corroborated by physical facts discovered and detailed by other witnesses. *Held*, that in holding the witness competent, the trial court did not abuse its discretion. *Id.*

Ese. J. of.
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